Supreme Court, U.S.
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No. 00- 001321

IN THE

Supreme Court of the United States

BATH PETROLEUM STORAGE INC.,
Petitioner,

v.

MARKET HUB PARTNERS, L.P., MARKET HUB PARTNERS, INC., TPC CORPORATION AND COALITION FOR RESOURCES AND ENVIRONMENT IN THE SOUTHERN TIER, INC.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the *Noerr-Pennington* doctrine, which is rooted in this Court's construction of the Sherman Act, applies outside the antitrust context, specifically to fraudulent petitioning activities that are unlawful under the RICO statute?

Whether intentional misrepresentations that are made to courts and other adjudicative bodies as part of an attempt to inflict collateral harm on competitors are subject to immunity under the *Noerr-Pennington* doctrine?

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed in the caption of the case. Pursuant to Sup. Ct. R. 29.6, Petitioner Bath Petroleum Storage Inc. declares that it is a wholly-owned subsidiary of E.I.L. Petroleum, Inc.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
INTRODUCTION	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE PETITION	10
I. THE SECOND CIRCUIT'S DECISION IS PART OF A BROAD CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE SCOPE OF THE *NOERR-PENNINGTON* DOCTRINE	10
A. The Second Circuit's Decision That The *Noerr-Pennington* Doctrine Applies Outside The Antitrust Context Conflicts With The Decisions Of Other Courts Of Appeals And With Decisions Of This Court	10
B. The Second Circuit's Treatment Of The "Fraud Exception" To The *Noerr-Pennington* Doctrine Conflicts With The Decisions Of Other Courts Of Appeals And With Decisions Of This Court	12
II. THE COURT SHOULD GRANT THE PETITION TO DETERMINE THE PROPER SCOPE OF THE *NOERR-PENNINGTON* DOCTRINE	15

TABLE OF CONTENTS—Continued

Page

A. *Noerr-Pennington* Immunity Applies Exclusively To Claims Brought Under The Sherman Act 15

B. The Fraud Exception To *Noerr-Pennington* Immunity Applies Regardless Of Whether The Government Is Influenced By The Fraud 21

CONCLUSION 25

TABLE OF AUTHORITIES

CASES — Page

Allied Tube & Conduit Corp. v. *Indian Head, Inc.*, 486 U.S. 492 (1988) 16, 22

Armstrong Surgical Ctr., Inc. v. *Armstrong County Mem'l Hosp.*, 185 F.3d 154 (3rd Cir. 1999), *cert. denied*, 120 S. Ct. 2716 (2000) 13

Bill Johnson's Rests., Inc. v. *NLRB*, 461 U.S. 731 (1983) 4, 17

California Motor Transp. Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972) 4, 16, 21

Cardtoons, L.C. v. *Major League Baseball Players Ass'n*, 208 F.3d 885 (10th Cir.), *cert. denied*, 121 S. Ct. 175 (2000) 11, 19

Cheminor Drugs, Ltd. v. *Ethyl Corp.*, 168 F.3d 119 (3d Cir.), *cert. denied*, 528 U.S. 871 (1999) 12

Clipper Exxpress v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982) 14, 15, 22

Coastal States Mktg., Inc. v. *Hunt*, 694 F.2d 1358 (5th Cir. 1983) 11

City of Columbia v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991) 13, 16

Cove Road Dev. v. *Western Cranston Indus. Park Assocs.*, 674 A.2d 1234 (R.I. 1996) 21

Eastern R.R. Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 2, 3, 15, 16, 18

FTC v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990) 3, 16

Florida Fern Growers Ass'n v. *Concerned Citizens*, 616 So. 2d 562 (Fla. Dist. Ct. App. 1993) 21

George R. Whitten, Jr., Inc. v. *Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970) 13

TABLE OF AUTHORITIES—Continued

	Page
Gregory v. *Ashcroft*, 501 U.S. 452 (1991)	20
Israel v. *Baxter Labs., Inc.*, 466 F.2d 272 (D.C. Cir. 1972)	13
Kottle v. *Northwest Kidney Ctrs.*, 146 F.3d 1056 (9th Cir. 1998), *cert. denied*, 525 U.S. 1140 (1999)	14
Liberty Lake Invs., Inc. v. *Magnuson*, 12 F.3d 155 (9th Cir. 1993)	13
McDonald v. *Smith*, 472 U.S. 479 (1985)	20
NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982)	16
Potters Med. Ctr. v. *City Hosp. Ass'n*, 800 F.2d 568 (6th Cir. 1986)	13, 14
Pound Hill Corp. v. *Perl*, 668 A.2d 1260 (R.I. 1996)	20
Professional Real Estate Investors, Inc. v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993)	*passim*
Protect Our Mountain Env't, Inc. v. *District Court*, 677 P.2d 1361 (Colo. 1984)	21
Reves v. *Ernst & Young*, 507 U.S. 170 (1993)	19
Russello v. *United States*, 464 U.S. 16 (1983)	19
St. Joseph's Hosp., Inc. v. *Hospital Corp. of Am.*, 795 F.2d 948 (11th Cir. 1986)	13
Sugarman v. *Dougall*, 413 U.S. 634 (1973)	20
United Mine Workers of Am. v. *Pennington*, 381 U.S. 657 (1965)	2, 16
United States v. *Turkette*, 452 U.S. 576 (1981)	19
Walker Process Equip., Inc. v. *Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965)	14, 22
Whelan v. *Abell*, 48 F.3d 1247 (D.C. Cir. 1995)	11, 12
Woods Exploration & Producing Co. v. *Aluminum Co. of Am.*, 438 F.2d 1286 (5th Cir. 1971)	13

TABLE OF AUTHORITIES—Continued

STATUTES

	Page
Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922	19
15 U.S.C. § 1	18
§ 2	2
18 U.S.C. § 371	18
§ 1961 *et seq*	3, 11
§ 1962	2

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit was issued on October 11, 2000; is reported at 229 F.3d 1135 (table op.); and is reproduced in the Appendix ("App.") at 1a-3a. The Order of the United States District Court for the Western District of New York dismissing petitioner's complaint was issued on February 25, 2000 (No. 98-CV-6138 CJS); and is reproduced in App. at 4a-42a.

JURISDICTION

The opinion and judgment of the court of appeals was entered on October 11, 2000, and the petition for panel rehearing and for rehearing en banc was denied November 17, 2000, App. 43a-44a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) & (d):

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
>
> It shall be unlawful for any person to conspire to violate any of the provisions . . . of this section.

Sherman Act, 15 U.S.C. § 2:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

INTRODUCTION

In this case, the court of appeals held (1) that the *Noerr-Pennington* doctrine[1] immunizes petitioning activities that would otherwise violate the Racketeer Influenced Corrupt

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[1] The doctrine takes its name from this Court's first decisions that the Sherman Act does not hold liable petitioning activity used to anticompetitive ends. *See Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657 (1965).

Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*; and (2) that misrepresentations made in the process of petitioning the government are not immunized by *Noerr-Pennington* if the government did not rely on the misrepresentations in its disposition of the action. In arriving at these conclusions, the Second Circuit, like the district court below, provided scant explanation for either conclusion. On the first point, the courts cited, without elaboration, various courts of appeals that had similarly concluded that *Noerr-Pennington* immunity is applicable outside the antitrust context. On the second point, the district court—the only of the two courts to address this question explicitly—cited one other court of appeals, again without elaboration, for the rule that only "material" misrepresentations are excepted from *Noerr-Pennington.*

In so holding, the Second Circuit brought itself into direct conflict with: (1) other courts of appeals that have stated that the *Noerr-Pennington* doctrine stems from a construction of the Sherman Act, and thus is not applicable outside that context; and (2) other courts of appeals that have not adopted the requirement that misrepresentations submitted to a judicial body be material before they are excepted from *Noerr-Pennington* immunity. See *infra* at 10-15. The Second Circuit's decision thus creates, and adds to, substantial uncertainty in the federal courts about the scope of the *Noerr-Pennington* doctrine outside the antitrust context, and the contours of the exception for fraud or misrepresentation.

The Second Circuit's decision is also in substantial tension with decisions of this Court. On several occasions, this Court has suggested that the *Noerr-Pennington* doctrine has its roots in a construction of the Sherman Act, and to the extent the First Amendment right to petition is implicated, it is only to inform a proper interpretation of the Act. See *Eastern R.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137, 144 (1961); *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990); *infra* at 16-17. Similarly,

this Court has demonstrated that, to the extent *Noerr-Pennington* is to be extended beyond the Sherman Act context, it must be done through a reasoned construction of the federal statute at issue. See *Bill Johnson's Rests., Inc.* v. *NLRB*, 461 U.S. 731, 741-43 (1983); *infra* at 17-18. The Second Circuit did not even suggest why such immunity is inherent in a construction of the RICO statute, and relevant differences between the RICO statute and the Sherman Act demonstrate that an extension of *Noerr-Pennington* immunity into that arena is inappropriate. In particular, whereas group efforts to petition the government can, and often do, have legitimate, meritorious ends, and are thus outside the reach of the Sherman Act, when such activity violates a predicate criminal act there are no similar countervailing social benefits that would support immunity from RICO liability. The only potential source of support for the Second Circuit's decision is the First Amendment's Petition Clause; however, a move to constitutionalize *Noerr-Pennington* creates the risk that petitioning immunity—initially applicable only against claims arising under the Sherman Act—will be wrongly extended to other federal and state causes of action, both statutory and common law.

Similarly, the Second Circuit's rule that only intentional misrepresentations submitted to a court or judicial body that are *material* to that body's disposition of the action is inconsistent with this Court's teaching that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 513 (1972). Whereas the remedy for fraud and misrepresentations in the political arena is robust and open debate, no such panacea is available in the judicial context, in which the courts, or adjudicative agencies, rely on the representations of the parties before them. Misrepresentations undermine the legitimacy of the judicial process, and this is

true regardless of whether the judicial body is eventually influenced by the misrepresentations or not. Whereas speech in the political arena must not be chilled, attempts to deceive in the judicial arena must be guarded against, and an extension of *Noerr-Pennington* immunity to protect such misrepresentations must be corrected.

Certiorari should be granted to resolve the important conflicts among the courts of appeals; to decide the important and recurring question of the application and scope of the *Noerr-Pennington* doctrine and its statutory foundation; and to ensure that the doctrine not be extended to cover intentional attempts to deceive courts and other judicial bodies, whether successful or not.

STATEMENT OF THE CASE

Petitioner, Bath Petroleum Storage Inc. ("BPSI") operates a salt cavern storage facility at Bath, New York, in which it stores liquid petroleum gas. Respondents are TPC Corporation ("TPC"), its affiliates, Market Hub Partners, L.P., and Market Hub Partners, Inc. (collectively "MHP") and Coalition for Resources and Environment in the Southern Tier, Inc. ("CREST"), a non-profit corporation. Since its inception, CREST has been funded by MHP and/or TPC and used by them as a front for the anticompetitive purposes alleged in the Complaint.

Respondent TPC, through MHP, is the largest owner of natural gas salt cavern storage deliverability in the United States. Since 1995, through one of its affiliates, MHP has been developing a salt cavern storage facility for the purpose of storing high deliverability natural gas in Tioga, Pennsylvania. Tioga is approximately 50 miles southeast of Bath, New York.

In 1996, BPSI entered into a lease agreement with CNG Transmission Corp. ("CNGT"), an interstate natural gas

pipeline company. Under the agreement, BPSI would provide CNGT with natural gas storage capacity from its existing caverns by late 1997 and from caverns under construction by 1999. CNGT was obligated to apply for a Certificate of Public Convenience and Necessity from the Federal Energy Regulatory Commission ("FERC") to allow BPSI to transfer a portion of its facility that had been used to store liquid petroleum gas into a storage facility for natural gas. Both CNGT and BPSI agreed to apply to obtain necessary permits from the United States Environmental Protection Agency ("EPA") and the New York State Department of Environmental Conservation ("NYDEC").

In May 1996, CNGT filed an application with FERC for the required certificate to use the BPSI facility for natural gas storage. In response to a public notice filed by FERC, MHP filed a motion to intervene in the proceeding. The motion alleged that BPSI had already begun construction, drilling, solution mining and site preparation of natural gas storage caverns without FERC authorization.

On September 10, 1996, FERC issued a determination that BPSI could not develop its salt caverns for gas storage without obtaining the requisite FERC authorization. CNGT responded by amending its application, in response to which MHP filed another protest. In its protest, MHP alleged that it had discovered evidence of a geological fault at the facility's site, and that the site was unsafe and constituted an environmental hazard. In support of these allegations MHP filed false affidavits prepared by the engineers it had hired to produce geological reports supportive of its Tioga project.

MHP filed virtually identical objections to BPSI's applications to the EPA for necessary underground storage permits. CREST, at MHP and TPC's behest, filed the same with NYDEC, seeking to impede BPSI's permit applications with that agency.

This was not the first salt cavern storage project that MHP, TPC and CREST's affiliates had sought to bar from entering the high deliverability natural gas salt storage industry in the northeastern United States. From 1995-97, MHP and another non-profit corporation it funded, Concerned Citizens of Cohocton Valley ("CCCV"), later a member of CREST, filed objections with FERC as well as various lawsuits seeking to stop the Avoca Natural Gas Project, located in Avoca, New York, a few miles from Bath. That effort succeeded. In May 1997, the Avoca project was abandoned.

Similarly, MHP filed spurious objections with FERC related to an application filed by New York State Electric and Gas Corporation with regard to the Seneca Lake Storage project, also located in New York. FERC rejected MHP's assertions.

In each case, the modus operandi was the same. MHP would, either itself, or through a sham environmental group, oppose any salt cavern storage projects which could pose a threat of competition to MHP and its Tioga project. Either MHP or the environmental group would file fraudulent and misleading statements concerning the would-be competitor with state or federal regulatory agencies. The efforts were undertaken to delay or prevent the other entities from entering the high deliverability natural gas storage market.

In November 1997, CNGT informed BPSI that, as a direct result of the defendants' scheme to thwart regulatory approval, CNGT had decided to terminate the lease with BPSI. This information was made public on January 29, 1998, one day after FERC dismissed CNGT's application, without prejudice, for its failure to respond in a timely fashion to its latest inquiries. Significantly, later in 1998, EPA, the only agency to treat the permit applications on their merits, issued the underground storage permits sought by BPSI and rejected MHP's claims, including its assertion that a

geological fault under the BPSI facility made the project environmentally unsafe.

In March, 1998, BPSI filed suit against MHP and their corporate parent, TPC. In addition to several state law claims, the Complaint alleged that MHP violated and conspired to violate the RICO statute, 18 U.S.C. § 1962(c) & (d), through a pattern of mail and wire fraud, and that MHP violated § 2 of the Sherman Act, 15 U.S.C. § 2. It contended that TPC controlled the board of directors and officers of Market Hub Partners, Inc., and together they attempted to eliminate any underground gas storage facility in the Northeast that could compete with its Tioga, Pennsylvania facility.

Specifically, BPSI claimed that in its submission to FERC, MHP had stated: (1) that there existed a geologic fault at the facility, when no such fault existed; (2) that BPSI's cavern design deviated materially from established guidelines, when in fact its design was superior to MHP's own Tioga cavern; (3) that there is evidence of structural failures at the site, when there is none; (4) that the existing caverns are structurally and mechanically unstable for high pressure natural gas storage and have the potential to cause severe environmental harm, when tests showed that its caverns were suited for the storage of natural gas; and (5) that there is the potential for the underground salt cavern storage facilities to collapse, jeopardizing human health and environmental safety, when there was "very little possibility" of such catastrophe. App. 64a-66a (Complaint, ¶¶ 72-73). BPSI alleged that these misrepresentations ultimately caused CNGT to terminate its lease with BPSI. *Id.* at 68a (Complaint, ¶ 83).

Defendants moved to dismiss BPSI's complaint for failure to state a claim upon which relief can be granted. The district court granted the motion on the basis that defendants' actions were shielded from liability by the *Noerr-Pennington*

doctrine. The court found that the defendants' actions did not meet the two-pronged test to establish the "sham" exception to the *Noerr-Pennington* doctrine: that (1) the activities were "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits"; and (2) that the activity is, at base, "'an attempt to interfere directly' . . . through the 'use of the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon.'" *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 60-61 (1993) ("*PREI*") (citation omitted; emphasis and brackets in original omitted).

The court found that defendants' actions were not baseless, because "the record supports at least some of the[] claims" that BPSI challenged. App. 35a. As for the claims that MHP had misrepresented certain facts to the Commission, the court recognized that "[o]ther courts have held that a party's misrepresentations to a court can constitute a sham for purposes of *Noerr-Pennington*, where 'a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy,'" *id.* at 31a (citing *Kottle* v. *Northwest Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998)). Nevertheless, in considering whether these misrepresentations would be subject to *Noerr-Pennington*, the court would examine:

> the outcome of the proceedings, including findings made by the relevant administrative tribunals, the nature of the particular allegations of the petition or actions before the administrative agency claimed to be fraudulent or improper, and whether these claimed misrepresentations or improper actions would have been significant to the ultimate outcome or continuation of the proceeding.

Id. (quoting *Music Center S.N.C. Di Luciano Pisoni & C.* v. *Prestini Musical Instruments Corp.*, 874 F. Supp. 543, 549 (E.D.N.Y. 1995)) (quotation marks omitted). On this basis, the court concluded that "even if MHP's claims were not true, there is no indication that those statements had any effect on

the duration or outcome of the FERC proceeding," since "FERC dismissed CNGT's application, without prejudice, because CNGT had failed to provide information which FERC had repeatedly requested." *Id.* As such, the misrepresentations were not "material."

In a summary order, the Second Circuit affirmed, agreeing with the district court that Defendants' behavior was not objectively baseless for "substantially the same reasons." App. 3a.

REASONS FOR GRANTING THE PETITION

MHP's actions before FERC were clearly targeted at derailing the lease transaction between BPSI and CNGT. Its actions were part of a conspiracy to block BPSI from entering the natural gas storage market, and in doing so MHP violated the RICO statute, and mislead federal agencies, including FERC. In conflict with other courts of appeals and with decisions of this Court, the Second Circuit held (1) that the *Noerr-Pennington* doctrine blocks not only allegations against MHP for Sherman Act violations but also for violations of RICO; and (2) that even MHP's intentional attempts to mislead FERC through fraudulent misrepresentations regarding the Bath facility are subject to *Noerr-Pennington* immunity.

I. THE SECOND CIRCUIT'S DECISION IS PART OF A BROAD CONFLICT AMONG THE COURTS OF APPEALS REGARDING THE SCOPE OF THE *NOERR-PENNINGTON* DOCTRINE.

A. The Second Circuit's Decision That The *Noerr-Pennington* Doctrine Applies Outside The Antitrust Context Conflicts With The Decisions Of Other Courts Of Appeals And With Decisions Of This Court.

Both the Second Circuit's decision and the district court's decision below rely on the mistaken premise that the *Noerr-*

Pennington doctrine applies to claims brought, not only under the Sherman Act, but also under the RICO statute, 18 U.S.C. § 1961 *et seq*. See App. 32a. The court offered no support for this conclusion, merely citing the courts of appeals that had applied *Noerr-Pennington* in RICO and other areas outside the antitrust context. See *id.* (citing *International Bhd. of Teamsters, Local 734 Health Workers and Welfare Trust Fund* v. *Phillip Morris, Inc.*, 196 F.3d 818, 826 (7th Cir. 1999); *Cheminor Drugs, Ltd.* v. *Ethyl Corp.*, 168 F.3d 119, 128-29 (3d Cir. 1999); *Hirschfeld* v. *Spankos*, 104 F.3d 16 (2d Cir. 1997)).

In extending *Noerr-Pennington* to claims brought under RICO, the Second Circuit deepened an already existing conflict among the circuits. On the other side of the conflict, the Tenth Circuit most recently held that a threat of litigation is not protected from state law claims by virtue of the *Noerr-Pennington* doctrine because such immunity applies only to claims brought under the Sherman Act. *Cardtoons, L.C.* v. *Major League Baseball Players Ass'n*, 208 F.3d 885, 889-90 (10th Cir.), *cert. denied*, 121 S. Ct. 175 (2000). The court further found that the threats were not covered by the First Amendment either, as they were not actually instances of "petition[ing] the Government." Other circuits have grappled with this question of when to apply *Noerr-Pennington* immunity and when to apply the First Amendment right to petition, noting that *Noerr-Pennington* derives specifically from a construction of the Sherman Act. See *Coastal States Mktg., Inc.* v. *Hunt*, 694 F.2d 1358, 1364-65 (5th Cir. 1983) ("*Noerr* was based on a construction of the Sherman Act. It was not a first amendment decision." (footnotes omitted)); cf. *Whelan* v. *Abell*, 48 F.3d 1247, 1253-54 (D.C. Cir. 1995) (refusing to decide whether *Noerr-Pennington* applies to common law torts of malicious prosecution or abuse of process).

B. The Second Circuit's Treatment Of The "Fraud Exception" To The *Noerr-Pennington* Doctrine Conflicts With The Decisions Of Other Courts Of Appeals And With Decisions Of This Court.

The Second Circuit's holding that only "material" misrepresentations are excepted from *Noerr-Pennington* immunity essentially eviscerates the "fraud or other misrepresentation" exception by subsuming it within the "sham" exception for litigation of "objectively baseless" claims. See *PREI*, 508 U.S. 49, 51 (1993). The Third Circuit's decision in *Cheminor Drugs, Ltd.* v. *Ethyl Corp.*, 168 F.3d 119 (3d Cir.), *cert. denied*, 528 U.S. 871 (1999), upon which the district court relied, is explicit in its view that the fraud exception is part of the exception for "objectively baseless" litigation:

> We decline to carve out a new exception to the broad immunity that *Noerr-Pennington* provides. Rather, we will determine whether [defendant's] petition was objectively baseless under the Supreme Court's test in *PRE*, *without regard to those facts that [plaintiff] alleges [defendant] misrepresented.* If the alleged misrepresented facts do not infect the core of [defendant's] claim and the government's resulting actions, then the petition had an objective basis and will receive *Noerr-Pennington* immunity . . . .

Id. at 123. The fraud exception then, according to the Second Circuit below and the Third Circuit in *Cheminor*, is no more than the relatively paltry recognition that a lawsuit won solely on the basis of fraud lacks an objective basis.

Myriad cases, however, adopt a far more robust conception of the "fraud or other misrepresentation" exception, which goes beyond the "objective basis" of the lawsuit and considers whether the specific activity is the sort of petitioning that *Noerr-Pennington* is meant to protect. *Whelan*, 48 F.3d at 1255 ("However broad the First Amendment right to petition

may be, it cannot be stretched to cover petitions based on known falsehoods."); *Liberty Lakes Invs., Inc.* v. *Magnuson*, 12 F.3d 155, 159 (9th Cir. 1993) (*Noerr-Pennington* immunity does not apply to a "a party's knowing fraud upon, or its intentional misrepresentations to, the court [that] deprive the litigation of its legitimacy"); *Potters Med. Ctr.* v. *City Hosp. Ass'n*, 800 F.2d 568, 580 (6th Cir. 1986) (stating that "knowingly false submissions or intentional misrepresentations constitute an abuse of governmental processes" and are not subject to *Noerr-Pennington* immunity); *St. Joseph's Hosp., Inc.* v. *Hospital Corp. of Am.*, 795 F.2d 948, 955 (11th Cir. 1986) (misrepresentations before a government agency acting in its judicial role "do not enjoy *Noerr* immunity"); *Israel* v. *Baxter Labs., Inc.*, 466 F.2d 272, 278 (D.C. Cir. 1972) ("The basic concern . . . may be deemed the integrity of the regulatory process. No actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption." (footnotes omitted)); *Woods Exploration & Producing Co.* v. *Aluminum Co. of Am.*, 438 F.2d 1286, 1296-98 (5th Cir. 1971); *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F.2d 25, 33 (1st Cir. 1970).[2]

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[2] The only contrary case in this regard is the Third Circuit's decision in *Armstrong Surgical Center, Inc.* v. *Armstrong County Memorial Hospital*, 185 F.3d 154, 158 (3rd Cir. 1999), *cert. denied*, 120 S. Ct. 2716 (2000), in which the court held that there is no exception to *Noerr-Pennington* for fraud or misrepresentation. The court in *Armstrong* relied heavily on this Court's decision in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 384 (1991), which reaffirmed that deliberate misrepresentations in the *legislative* arena "'reprehensible as [they are], can be of no consequence so far as the Sherman Act is concerned.'" The Third Circuit opinion ignores the decisions of this Court suggesting that *Noerr-Pennington* immunity might be more restricted in the *judicial* context, and is in direct conflict with *Cheminor Drugs*, which the Third Circuit decided less than four months earlier.

In *Kottle* v. *Northwest Kidney Centers*, 146 F.3d 1056, 1060 (9th Cir. 1998), *cert. denied*, 525 U.S. 1140 (1999), the Ninth Circuit went to great lengths to emphasize that the fraud exception to *Noerr-Pennington* is a separate exception from the exception for "objectively baseless" claims. The court recognized three types of activity that would be considered "sham" for purposes of *Noerr-Pennington*: (1) an "objectively baseless" lawsuit; (2) a pattern of multiple lawsuits, brought "'without regard to the merits and for the purpose of injuring a market rival,'" *id.* (quoting *USS-POSCO Indus.* v. *Contra Costa County Bldg. & Constr. Trades Council*, 31 F.3d 800 (9th Cir. 1994)); and (3) the "making [of] intentional misrepresentations," which "'deprive the litigation of its legitimacy.'" *Id.* (quoting *Liberty Lake Invs.*, 12 F.3d at 158).

The Ninth Circuit's fraud exception stems from an extension of the *Walker Process* doctrine. Just as "the enforcement of a patent procured by fraud on the Patent Office may be violative of § 2 of the Sherman Act provided the other elements necessary to a § 2 case are present," *Walker Process Equip., Inc.* v. *Food Machinery & Chem. Corp.*, 382 U.S. 172, 174 (1965), so too any attempt to violate antitrust law through fraud or misrepresentation is itself a violation of the Sherman Act. *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1261 (9th Cir. 1982); see also *Potters Med. Ctr.*, 800 F.2d at 580 ("Such knowingly false submissions or intentional misrepresentations constitute an abuse of governmental processes, analogous to the antitrust violation which occurs when one procures a patent through fraud on the patent office."). On the basis of this analogy, the Ninth Circuit has rejected the argument that the misrepresentation must be "material" to the proceeding: "neither *Walker Process*, nor subsequent cases, require that the body on whom the fraudulent misstatements are pressed ultimately believe those statements . . . . *Walker Process* recognizes that fraud-

ulently supplying information can result in monopolization, and therefore violate the antitrust laws." *Clipper Exxpress*, 690 F.2d at 1262 (citations omitted). Furthermore, because "[a]dministrative bodies and courts," unlike political bodies "rely on the information presented by the parties before them . . . [and] seldom, if ever, have the time or resources to conduct independent investigations," a private cause of action for fraudulent statements, both material and not, would deter parties from engaging in such misrepresentations. *Id.* (footnote omitted).

Whereas the Second and Third Circuits view the fraud exception as an extension of the sham exception for objectively baseless lawsuits, the other courts of appeals to consider the question view it as a separate exception, rooted in the notion that attempts to defraud judicial bodies are not worthy of immunity from the antitrust laws. Misrepresentations before adjudicative bodies undermine the legitimacy of these bodies and impair their functioning to the same, if not greater, extent than does the pursuit of "objectively baseless" claims. The differing views on whether such frauds and misrepresentations must be material to fall outside *Noerr-Pennington* is a symptom of these widely disparate theories of the fraud exception.

II. THE COURT SHOULD GRANT THE PETITION TO DETERMINE THE PROPER SCOPE OF THE *NOERR-PENNINGTON* DOCTRINE.

A. *Noerr-Pennington* Immunity Applies Exclusively To Claims Brought Under The Sherman Act.

The Second Circuit's decision is contrary to the *Noerr-Pennington* doctrine as it was initially conceived, and how it later developed. In *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight Inc.*, 365 U.S. 127 (1961), this Court, in establishing antitrust immunity for petitioning activity, relied on two grounds, both rooted in a construction of the

Sherman Act. First, the Court explained that any interpretation of the Sherman Act that would impose liability for petitioning activities "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act." *Id.* at 137; see also *id.* at 144 ("[W]e conclude that no attempt to interfere with business relationships in a manner proscribed by the Sherman Act is involved in this case."). Second, the Court noted that a contrary construction of the Sherman Act might "raise important constitutional questions," *id.* at 138. Although the *Noerr* Court recognized a constitutional element to this petitioning immunity in the antitrust area, this Court has explicitly recognized that this immunity derives, at base, from an interpretation of the Sherman Act. See *FTC* v. *Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 424 (1990) (noting that the Court has "[*i*]*nterpret*[*ed*] *the Sherman Act* in the light of the First Amendment's Petition Clause" (emphasis added)).

The only cases in which this Court has applied, or even considered the application of, *Noerr-Pennington* immunity have been antitrust cases. See, *e.g.*, *PREI*, 508 U.S. 49, 52 (1993); *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 369 (1991); *Superior Court Trial Lawyers Ass'n*, 493 U.S. at 421; *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 497 (1988); *California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508, 509 (1972); *United Mine Workers of Am.* v. *Pennington*, 381 U.S. 657, 659 (1965); *Noerr*, 365 U.S. at 129. Although this Court has, of course, recognized immunity for petitioning activities in other contexts, it has done so only after a thorough consideration of the First Amendment right to petition, see, *e.g.*, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 915 (1982) (finding a nonviolent boycott was entitled to First Amendment immunity from state antitrust and tort statutes), or through a careful construction of the particular statute at

issue, in light of the First Amendment right to petition, see, *e.g.*, *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731, 741 (1983) (in considering whether the filing and prosecution of a lawsuit by an employer can be enjoined, stating that it must "be sensitive to these First Amendment values in construing the [National Labor Relations Act] in the present context").

This Court has provided instruction for how *Noerr-Pennington* should be extended, if it is to be extended at all, to other federal statutes. In *Bill Johnson's Restaurants*, this Court considered whether it is lawful under the National Labor Relations Act ("NLRA") for a State to enjoin an employer from bringing a retaliatory suit against its employees based on insubstantial claims. 461 U.S. at 743. While the Court considered the First Amendment rights of the plaintiffs, the inquiry at base concerned the proper construction of the NLRA, which rested on several factors:

> When a suit presents genuine factual issues, the state plaintiff's First Amendment interest in petitioning the state court for redress of his grievance, his interest in having the factual dispute resolved by a jury, and the State's interest in protecting the health and welfare of its citizens, lead us to *construe the Act* as not permitting the Board to usurp the traditional fact-finding function of the state-court jury or judge.

Id. at 745 (emphasis added); see also *id.* at 741 ("[w]e construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose . . . . We should be sensitive to these First Amendment values in construing the NLRA in the present context." (citation omitted)). Although the Court borrowed much of its reasoning from the *Noerr-Pennington* line of cases, it made clear that it did so only by analogy. *Id.* at 744 ("Considerations analogous to these led us in the antitrust context to adopt the 'mere sham' exception . . . ."); see also

PREI, 508 U.S. at 59 ("*by analogy* to *Noerr*'s sham exception, we held that even an 'improperly motivated' lawsuit may not be enjoined under the [NLRA] . . . unless such litigation is 'baseless'" (emphasis added)).

The Second Circuit erred by failing to undertake such an analysis before extending *Noerr-Pennington* immunity to the RICO context. The peculiarities of the Sherman Act are simply not present in the RICO statute. In particular, the *Noerr* Court found that conspiracies to petition the government do not fall within the Act's restriction on "combination[s] . . . in restraint of trade," 15 U.S.C. § 1, because

> they bear very little if any resemblance to the combinations normally held violative of the Sherman Act, combinations ordinarily characterized by an express or implied agreement or understanding that the participants will jointly give up their trade freedom, or help one another to take away the trade freedom of others through the use of such devices as price-fixing agreements, boycotts, market-division agreements, and other similar arrangements.

Noerr, 365 U.S. at 136. Moreover, "difficulties . . . would be presented by a holding that the Sherman Act forbids association for the purpose of influencing the passage or enforcement of laws." *Id.* at 137

Similar immunity is not necessary to protect associations for the purpose of defrauding the government. Moreover, it cannot be said that such conspiracies are of a different type than those activities that the statute covers. In contrast to the Sherman Act, which this Court construed to cover only *business* activities that traditionally came within the scope of the statute, there is nothing to suggest that liability would not attach to conspiracies to deceive the government through fraudulent submissions and misrepresentations. 18 U.S.C. § 371 explicitly brings such activity within its scope,

criminalizing the activities of "two or more persons [to] conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose." And, as this Court has recognized on numerous occasions, Congress pointed out in an uncodified section of the Act that RICO should be "liberally construed to effectuate its remedial purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 904(a), 84 Stat. 922, 947; see *Russello* v. *United States*, 464 U.S. 16, 27 (1983); *United States* v. *Turkette*, 452 U.S. 576, 587 (1981). Of course, as this Court has hastened to point out, this is not "an invitation to apply RICO to new purposes that Congress never intended," *Reves* v. *Ernst & Young*, 507 U.S. 170, 183 (1993), but nothing in the Act or its purposes suggest that Congress carved out an exception for conspiracies involving fraudulent petitioning activity. Whereas combinations to petition the government might be legitimate and as such cannot be found violative of the Sherman Act, when the actions are found to violate a predicate criminal statute, as alleged here, there is no countervailing social benefit that supports immunizing such action from RICO liability.

Although courts, like the Second Circuit, often use *Noerr-Pennington* and the First Amendment Right to Petition interchangeably, the danger of this cannot be overstated. *First*, a blanket invocation of *Noerr-Pennington* immunity without a thorough consideration of the statute at issue or of the First Amendment right to petition wrongly extends the scope of both doctrines. The Tenth Circuit in *Cardtoons, L.C.* v. *Major League Baseball Players Ass'n* made clear that the *Noerr-Pennington* doctrine and the First Amendment are not co-extensive in the activities that they immunize: whereas pre-litigation threats might be immunized against antitrust liability by the former, they are not by the latter, because they do not technically "petition the Government." 208 F.3d 885,

890-93 (10th Cir.), *cert. denied*, 121 S. Ct. 175 (2000). Moreover, whereas *Noerr-Pennington* provides absolute immunity, subject to the sham exceptions, claims under the Petition Clause are subject to general First Amendment limitations. See *McDonald* v. *Smith*, 472 U.S. 479, 485 (1985) ("To accept petitioner's claim of absolute immunity would elevate the Petition Clause to special First Amendment status."). As such, courts must be cautious in the appellations they use because the type of immunity is determinative of its scope.

Second, established principles of constitutional interpretation dictate that courts should be cautious in extending constitutional doctrines to avoid intrusion into areas that are within the domains of the states. See *Sugarman* v. *Dougall*, 413 U.S. 634, 648 (1973) (stating that "[Equal Protection] scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives"); cf. *Gregory* v. *Ashcroft*, 501 U.S. 452, 467-70 (1991). Recently, however, the confusion over whether *Noerr-Pennington* is of constitutional or statutory magnitude has led to uncertainty regarding its applicability in state courts, in particular to state common law causes of action. Many states recognize a tort for "abuse of process," when plaintiffs undertake state legal proceedings, even if objectively meritorious, to pursue collateral objectives unrelated to those within the scope of the litigation. If *Noerr-Pennington* is treated as a First Amendment doctrine, then plaintiffs would generally be immunized against claims of abuse of process. State courts have split on the question of *Noerr-Pennington*'s applicability to state common law causes of action, and this Court should resolve this important question, which goes to the heart of a state's ability to regulate its own judicial process. Compare *Pound Hill Corp.* v. *Perl*, 668 A.2d 1260, 1264 (R.I. 1996) ("the *Noerr-Pennington* doctrine, resting as it does upon the First Amendment right to petition, does add a

constitutional gloss to civil actions for abuse of process"), and *Cove Road Dev.* v. *Western Cranston Indus. Park Assocs.*, 674 A.2d. 1234, 1237 (R.I. 1996) ("the constitutional protection of the right to petition is no less compelling in the context of common-law tort claims than in the framework of federal antitrust legislation"), and *Protect Our Mountain Env't, Inc.* v. *District Court*, 677 P.2d 1361, 1364-66 (Colo. 1984), with *Florida Fern Growers Ass'n* v. *Concerned Citizens*, 616 So.2d 562, 569 (Fla. Dist. Ct. App. 1993) (declining to apply the *Noerr-Pennington* doctrine to common law torts because the common law adequately protects plaintiffs' "'First Amendment rights and adequately guards against the danger of intimidation suits'").

B. The Fraud Exception To *Noerr-Pennington* Immunity Applies Regardless Of Whether The Government Is Influenced By The Fraud.

Although this Court has never resolved the question whether *Noerr-Pennington* immunity extends to misrepresentations made in adjudicatory proceedings, see, *e.g.*, *PREI*, 508 U.S. at 62 n.6 ("We need not decide here whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations."), it has certainly provided support for such a fraud exception. See, *e.g.*, *California Motor Transp.*, 404 U.S. at 513 ("Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process."); see also *id.* at 516-17 (Stewart, J., concurring in the judgment) ("In *Noerr* the defendants were joined together in an effort to induce legislative and executive action. Here, . . . the defendants (petitioners) have joined to induce administrative and judicial action. The difference in type of governmental body might make a difference in the applicability of the antitrust laws if the petitioners had made misrepresentations of fact or law to these tribunals, or had engaged in perjury, or fraud, or

bribery."); *Allied Tube & Conduit Corp.*, 486 U.S. at 500 & n.4 (stating that "in whatever forum, private action that is not generally aimed at procuring favorable government action is a mere sham" that can result in antitrust violations, but that "in less political arenas, unethical and deceptive practices can constitute abuses of administrative or judicial processes that may result in antitrust violations").

The language of these opinions suggest that whereas only objectively baseless actions will fall within an exception to *Noerr-Pennington* in the political context, the exception to *Noerr-Pennington* in the adjudicative context is much broader. Whereas robust debate may uncover certain misrepresentations in the realm of politics, the same is not necessarily true in the judicial realm. As the Ninth Circuit in *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, stated:

> There is an emphasis on debate in the political sphere, which could accommodate false statements and reveal their falsity. In the adjudicatory sphere, however, information supplied by the parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws.

690 F.2d 1240, 1261 (9th Cir. 1982). Just as fraudulent misrepresentations are sufficient to strip a patent holder of the immunity that the patent laws provide from antitrust liability, *Walker Process Equipment, Inc.* v. *Food Machinery & Chemical Corp.*, 382 U.S. 172, 174; *id.* at 180 (Harlan, J., concurring) ("as to this class of improper patent monopolies, antitrust remedies should be allowed room for full play"), so too misrepresentations during judicial proceedings are sufficient to strip a litigant of *Noerr-Pennington* immunity from the antitrust laws.

The Second Circuit's emphasis on the outcome of the action, however, reflects an unduly narrow conception of the sham exception for misrepresentations in the judicial arena. When we consider a single lawsuit brought to inflict collateral harm on a competitor, it makes sense to consider whether the lawsuit is "objectively baseless" because no reasonable plaintiff would bring the lawsuit if only interested in the outcome of the litigation. However, when a competitor abuses the judicial process, not through an objectively baseless lawsuit, but rather by committing fraud in the course of the lawsuit, the question whether the lawsuit itself was objectively baseless, or whether the decisionmaker relied on the fraud, is beside the point.

First, intentional misrepresentations are attempts to distort and delegitimize the judicial process, unworthy of the protection of *Noerr-Pennington*, whether in the end they succeed or not. A misrepresentation can go to the heart of an action, even if it does not provide the grounds for the eventual outcome of the action. This case provides a perfect example. MHP's misrepresentations as to various safety problems at the facility surely went to the core of the FERC proceeding, despite the fact that, in the end, the action was dismissed due to CNGT's failure to provide requested information.[3] Surely this fortuity, perhaps relevant to an eventual damages inquiry, is irrelevant to the question whether MHP's submissions should be immunized.

Second, since the focus of the sham exception is on the *collateral* harm, it is possible that the fraud will have no impact on the actual outcome of the proceeding, but will nonetheless have a drastic anticompetitive effect. As Bath Petroleum alleges, MHP's fraudulent submissions to FERC

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[3] In fact, EPA, the only agency to consider MHP's objections on the merits, rejected the claim that a geological fault under the facility made it environmentally unstable. *See supra* at 7.

were made as part of a greater effort to prevent a competitive entity from gaining access to the natural gas storage market by: (1) delaying Bath Petroleum's permit approval process for such a substantial period of time that MHP could obtain approval of its own Tioga project prior to Bath Petroleum's obtaining its own required permits; (2) increasing Bath Petroleum's transactional costs so significantly that it would ultimately abandon its efforts to become a natural gas storage facility; and (3) causing sufficient delays to prompt CNGT to terminate the lease agreement. App. 68a (Complaint, ¶ 83). CNGT decided to terminate the lease with Bath Petroleum as a direct result of MHP's actions, long before FERC's determination that CNGT had failed to provide all requested information. As such, these fraudulent submissions were certainly "material" to the collateral harm caused, even if not to the actual FERC proceeding. It is precisely this sort of behavior that the sham exception is meant to prevent.

The scope of the sham exception for fraud or misrepresentations is of great importance in protecting courts and other judicial bodies against deception, and the Second Circuit's decision reflects a grave misunderstanding of the *Noerr-Pennington* doctrine and the sham exception. Over seven years have passed since this Court left open the question whether such an exception exists, see *PREI*, 508 U.S. at 61 n.6, and sufficient time has elapsed for this issue to percolate within the lower courts. Intentional fraud in an adjudicatory context that has both the intent and effect of causing a massive competitive injury has no redeeming social value, and, unlike legitimate, objectively meritorious petitioning activities, it cannot be argued that such behavior is outside the scope of the Sherman Act or the RICO statute. As such, private causes of action must be allowed to go forward to remedy and deter such fraudulent and anti-competitive behavior in the future. The opportunity is ripe for the Court to resolve this open question.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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February 15, 2001

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APPENDIX A

UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

No. 00-7302

BATH PETROLEUM STORAGE, INC.,
Plaintiff-Appellant,

v.

MARKET HUB PARTNERS, L.P., Market Hub Partners, Inc., TPC Corporation, and Coalition for Resources and Environment in the Southern Tier, Inc.,
Defendants-Appellees.

Oct. 11, 2000

Appeal from the United States District Court for the Western District of New York, Siragusa, J.

Present JACOBS, STRAUB, and SACK, Circuit Judges.

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be AFFIRMED.

Bath Petroleum Storage, Inc. ("Bath") appeals from the judgment of the United States District Court for the Western District of New York (Siragusa, J.) dismissing its suit against Market Hub Partners, L.P., Market Hub Partners, Inc., TPC Corporation, and Coalition for Resources and Environment in the Southern Tier, Inc. (collectively "Appellees") pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure.

A detailed factual record is set out by the district court; familiarity with the record is assumed. *See Bath Petroleum Storage v. Market Hub Partners, L.P.*, No. 98-CV-6138 CJS, 2000 WL 1279160, at *2-12 (W.D.N.Y. Feb. 25, 2000). Briefly, the action arises out of Bath's attempt to enter the natural gas storage market. Bath claims that Appellees made false statements before various administrative bodies regulating the industry (specifically, regulating Bath's entry into the industry). Bath claims these false statements led to delays, and that these delays caused its partner (CNG Transmission Corp.) to breach a lease agreement it had with Bath.

The district court's dismissal of the suit was entirely appropriate. In order to succeed, Bath must first surmount the significant hurdles imposed by the "*Noerr Pennington*" Doctrine, established by the United States Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). Essentially, the Doctrine protects under the First Amendment efforts to influence governmental action through litigation, lobbying, and the like. Such activities are immunized from antitrust liability, provided the activities are more than a mere "sham." *See Prof'l Real Estate Investors, Inc. v. Columbia Picture Indus.*, 508 U.S. 49, 56-57 (1993). *Noerr Pennington* immunity is applicable to RICO actions and to state-law claims such as fraud and tortious interference. *See Int'l Bhd. of Teamsters, Local 734 Health Workers and Welfare Trust v. Phillip Morris, Inc.*, 196 F.3d 818, 826 (7th Cir.1999) (RICO suits); *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119, 128-29 (3d Cir.1999) (tortious interference and unfair competition); *cf. Hirschfeld v. Spankos*, 104 F.3d 16 (2d Cir.1997) (applying *Noerr Pennington* to § 1983 action).

In order to demonstrate that the Appellees' conduct was a sham, Bath must first prove that the behavior was

"objectively baseless in the sense that no reasonable [person] could realistically expect success on the merits." *Prof'l Real Estate Investors, Inc.*, 508 U.S. at 51 (referring to litigants and lawsuits, but with application to the broad scope of activities covered by the *Noerr-Pennington* Doctrine). The district court's decision reviews each of the administrative processes at which Bath alleges Appellees committed fraud and finds that in each instance, the Appellees' behavior cannot be said to be "objectively baseless." *See Bath*, 2000 WL 1279160, at *15-17. We agree with the district court for substantially the same reasons.

Bath also argues that the district court impermissibly relied upon evidence outside the record—namely, documents related to the proceedings before the various agencies that regulate Bath's entry into the natural gas storage market. This Court has consistently held that, in considering a motion to dismiss, a trial court may rely upon public documents of which the plaintiff had notice that are integral to the plaintiff's claim. *See, e.g., Cortec Indus. v. SUM Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir.1991); *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773-74 (2d Cir.1991). Accordingly, the district court committed no error in this regard.

For the reasons set forth above, the judgment of the district court is hereby AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT,
W.D. NEW YORK

No. 98-CV-6138 CJS

BATH PETROLEUM STORAGE, INC.,
Plaintiff,

v.

MARKET HUB PARTNERS, L.P., Market Hub Partners, Inc., TPC Corp., and Coalition for Resources and Environment in the Southern Tier, Inc.,
Defendants.

Feb. 25, 2000

DECISION and ORDER

SIRAGUSA, J.

INTRODUCTION

This is an action in which plaintiff, Bath Petroleum Storage, Inc. ("BPSI"), a company which was attempting to create an underground natural gas storage facility, claims that its business was unlawfully damaged by a competitor. Essentially, plaintiff alleges that defendants made fraudulent statements to several administrative agencies which were regulating plaintiff, and that as a result, plaintiff's attempt to create the gas storage facility failed. Plaintiff contends that defendants conspired to violate and did in fact violate Civil Rico 18 U.S.C. § 1961 *et seq.*, that they violated Section 349 of New York's General Business Law, that they tortiously interfered with plaintiff's contractual relationships, and that they perpetrated common law fraud. In addition, plaintiff

alleges that defendants Market Hub Partners and TPC violated the anti-trust laws of the United States and the State of New York, including § 2 of the Sherman Act, 15 U.S.C. § 2 and § 340 of New York General Business Law. Now before the Court are three separate motions to dismiss [# 13] [# 19][# 26] filed by defendants, pursuant to Federal Rules of Civil Procedure 9 and 12. For the reasons that follow, those motions to dismiss are granted.

BACKGROUND

The facts as set forth below are taken from the complaint and various documents submitted by defendants in support of their motions. On a motion to dismiss pursuant to Rule 12(b)(6), the Court's "consideration is limited to the factual allegations in plaintiff['s] . . . complaint, which are accepted as true, to documents attached to the complaint as an exhibit or incorporated in it by reference, to matters of which judicial notice may be taken, or to documents either in plaintiffs' possession or of which plaintiffs had knowledge and relied on in bringing suit." *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir.1993)(citing *Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47-48 (2d Cir.1991), *cert. denied*, 503 U.S. 960 (1992)). The Court may also consider facts stated in plaintiff's RICO case statement. *McLaughlin v. Anderson*, 962 F.2d 187, 189 (2d Cir.1992). However, "if a district court wishes to consider additional material, Rule 12(b) requires it to treat the motion as one for summary judgment under Rule 56, giving the party opposing the motion notice and an opportunity to conduct necessary discovery and to submit pertinent material." *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir.1991). In support of their motions to dismiss, defendants have submitted various documents related to the administrative actions before the FERC, DEC, and EPA, upon which plaintiff's action is based. These include the documents which plaintiff and defendants filed with the various agencies, certain correspondence

between them and the agencies, and the decisions of these agencies. Plaintiff, which was a party to these administrative proceedings, does not deny that it had notice of these documents. Although these documents were not attached to plaintiff's complaint, the Court finds that these are documents of which plaintiff had notice, and upon which plaintiff relied in bringing this action. Accordingly, the Court finds that it may properly consider these documents on a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), pursuant to *Cortec Industries, Inc. v. SUM Holding L.P.*, 949 F.2d 42, 47-8 (2d Cir.1991), *cert. denied*, 503 U.S. 960 (1992)(Noting that "where plaintiff has actual notice of all the information in the movant's papers and has relied upon these documents in framing the complaint the necessity of translating a Rule 12(b)(6) motion into one under Rule 56 is largely dissipated."); *see also, Novo Nordisk of North America, Inc. v. Genentech, Inc.* [1995-1 TRADE CASES ¶ 70,993], 885 F.Supp. 522, 526 (S.D.N.Y.1995)(holding that pursuant to *Cortec*, on a motion to dismiss pursuant to Rule 12(b)(6), court may consider findings of administrative law judge in a related administrative proceeding, where plaintiff had notice of exhibit, and exhibit was integral to plaintiff's claim); *Envirosource, Inc. v. Horsehead Resource Dev. Co., Inc.* [1996-2 TRADE CASES ¶ 71,492], 1996 U.S. Dist. LEXIS 9099, No. 95 CIV. 5106(AGS) 1996 WL 363091 at *5 (S.D.N.Y. Jul. 1, 1996). In the *Cortec* decision, the Second Circuit stated, in relevant part:

> We have held that when a plaintiff chooses not to attach to the complaint or incorporate by reference [documents] upon which it solely relies and which [are] integral to the complaint, the defendant may product [the documents] when attacking the complaint for its failure to state a claim, because plaintiff should not so easily be allowed to escape the consequences of his own failure.

Cortec Industries Inc. v. SUM Holding, L.P., 949 F.2d at 47. Thus, a plaintiff should not be permitted to survive a motion to dismiss and put a defendant to the trouble and expense of discovery simply by excluding highly relevant facts and documents from its complaint.

Since 1983, plaintiff has operated a natural gas storage business in Bath, New York, at a facility which has been in existence since the early 1950's. Plaintiff stores natural gas in underground salt caverns, which are created by drilling holes through the surface of the earth, through bedrock and other geological formations, until the salt layer is reached. Plaintiff next pumps fresh water into the salt layer, thereby dissolving the salt and creating a cavern. Plaintiff then pumps the saltwater brine out of the caverns, and stores it in brine ponds on its land. Finally, plaintiff disposes of some of this brine by discharging regulated amounts of the brine into the Cohocton River, which is adjacent to the facility. At all times relevant to the lawsuit, defendants, through one of their subsidiaries, N.E. Hub Partners, were creating their own salt-cavern natural gas storage facility in Tioga, Pennsylvania. Defendant TPC Corporation (TPC) is the United State's largest owner of natural gas salt cavern storage facilities, and plaintiff claims that TPC essentially owns and controls defendants Market Hub Partners, L.P., and Market Hub Partners, Inc. ("MHP").[1]

In 1995, MHP sought to purchase plaintiff's natural gas storage facility, however, the parties never reached agreement. Instead, in 1996, plaintiff entered into a lease agreement with another company known as CNG Transmission Corporation (CNGT), an inter-state natural gas pipeline company providing natural gas transportation and storage service principally in the northeastern and midAtlantic regions of the United States. Pursuant to this

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[1] The Court uses the abbreviation "MHP" herein to refer to both Market Hub Partners, L.P. and Market Hub Partners, Inc.

agreement, plaintiff agreed to provide CNGT with natural gas storage capacity from plaintiff's existing caverns by late 1997 and from new caverns under construction in 1999.

a. The Proceeding before FERC

As part of the agreement between plaintiff and CNGT, plaintiff needed to convert a portion of its facility previously used to store liquid propane gas into a storage facility for natural gas, a move which required the approval of the Federal Energy Regulatory Commission (FERC). CNGT was required, under the lease, to obtain a Certificate of Public Convenience and Necessity from FERC. On May 6, 1996, CNGT filed an application requesting such approval from FERC. On July 10, 1996, the New York Department of Environmental Conservation (DEC) sent a letter to FERC, noting that it had "several technical and environmental concerns on the feasibility of [CNGT's] proposed project." (Declaration of John P. Quinn [# 16], Exhibit 3) The DEC stated that since CNGT's application had not addressed the feasibility of storing natural gas in underground caverns at the Bath site, FERC should conduct "a comprehensive technical review" of the proposed project, and DEC listed a number of specific areas for FERC to review. (*Id.*) The DEC stated that "at a bare minimum," FERC should evaluate eleven specific concerns, including whether there were any geological faults at the project site. The DEC also described a number of environmental concerns, including the fact that solution mining would likely increase the amount of saltwater brine that plaintiff would want to discharge into the Cohocton River. Accordingly, the DEC indicated that it would require plaintiff to obtain a new State Pollution Discharge Elimination System (SPDES) permit to regulate plaintiff's discharge of saltwater brine. (*Id.*)

On August 15, 1996, in response to a public notice filed by FERC, MHP filed with FERC a 46-page motion to intervene in CNGT's proceeding and for a cease and desist order

against plaintiff.[2] ([# 40], Exhibit A). The motion alleged that plaintiff was at that time already engaged in construction, drilling, solution mining and site preparation of natural gas storage caverns without the necessary approval from FERC. Most of that motion, 33 pages of it, was legal argument explaining why plaintiff and its mining activities should be subject to FERC's jurisdiction. A portion of MHP's motion also described potential problems with using the Bath site as a natural gas storage facility. It described past problems that plaintiff had reported, including a tubing failure and fire which had occurred in number 2 and 2a wells. MHP asked FERC to issue a cease and desist order against BPSI's allegedly unauthorized mining activities. On August 28, 1996, MHP filed another motion in opposition to CNGT's application with FERC. That motion was 31 pages long and dealt exclusively with rates that CNGT had proposed to charge its customers if FERC approved its application. (Declaration of Drew J. Fossum [# 15], Exhibit B). On September 10, 1996, FERC issued a determination that plaintiff was subject to FERC's jurisdiction, and that plaintiff could not develop its salt caverns for gas storage any further without obtaining FERC approval. (Declaration of John P. Quinn [# 16], Exhibit 5). On October 23, 1996, FERC informed CNGT that since it had not received an application from either CNGT or BPSI for permission to develop the salt caverns, that it considered CNGT's application incomplete, and that it would not be able to process CNGT's application in a timely fashion. (*Id.*, Exhibit 6). Some time thereafter, CNGT amended its application, and on December 26, 1996, MHP filed with FERC a protest to CNGT's amended application. (Attachment to MHP Memorandum [# 40],

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[2] Arlington Storage Corporation, Public Service Electric and Gas Company, Long Island Lighting Company, New York State Electric & Gas Corporation and Chattanooga Gas Company also intervened in the FERC proceeding. (Declaration of Drew J. Fossum, [# 15]).

Exhibit B). In its protest, MHP alleged that it had discovered evidence of a geological fault at plaintiff's site. It also raised environmental concerns relating to plaintiff's disposal of the saltwater brine solution. However, at least half of the protest dealt only with issues relating to the project's proposed cost and rates to be charged by CNGT. On October 10, 1997, FERC requested additional information from CNGT. (Declaration of John P. Quinn [# 16], Exhibit 11). On January 28, 1998, FERC informed CNGT that it was dismissing its application without prejudice, because of CNGT's failure to provide requested information. (*Id.* Exhibit 12).

Plaintiff's complaint alleges that MHP's filings with FERC were fraudulent. The complaint states, in relevant part, that "the primary thrust of these objections was focused on the geological conditions present at the Bath Storage Facility and its appropriateness for the storage of natural gas. MHP also alleged that the BPSI facility was unsafe and constituted an environmental hazard."[3] (Complaint [# 1], P 72). Plaintiff contends that MHP made the following statements to FERC:

> a. A geological fault exists at the Bath Storage Facility. . . .;
>
> b. BPSI's cavern design and construction practices deviate materially from established guidelines promulgated by an subcommittee of the The Interstate Oil and Gas Compact Commission ("IOGC"). . . .;
>
> c. There is evidence of structural failures at the BPSI site;
>
> d. The existing caverns at the BPSI site are structurally and mechanically unstable for high pressure natural gas

[3] The Court notes that it has thoroughly reviewed MHP's objections, and while this was one of the issues raised by MHP, the Court does not agree that it was the "primary thrust" of MHP's objections.

storage and, given the potential for migration and release of explosive product from the wells across and possibly off site including the Cohocton River, the potential for devastating environmental impacts is high;

e. there is a potential for full scale collapse of the underground salt cavern storage facilities which would jeopardize the health and safety of area residents; permit which resulted in crop damage in downstream areas and will continue to result in significant potential for the degradation of downstream aquatic environments; and

g. BPSI cannot maintain pressure at levels required to use the caverns for the storage of natural gas.

(*Id.*). Plaintiff contends that these statements were false because, in fact, there was no geologic fault, its cavern design was superior to MHP's Tioga cavern, there was no evidence of structural failures, that based on testing, there was "very little possibility" of a catastrophe, it had fully complied with its SPDES permit, and tests showed that its caverns could withstand pressure so as to allow storage of natural gas. (*Id.* P 73). In response to MHP's filings, CNGT notified FERC that it believed MHP's allegations regarding the safety and feasibility of the project were false. (*See*, "Motion for Leave to Answer and Answer of CNG Transmission Corporation to the Protest of Market Hub Partners, L.P.", Declaration of John P. Quinn [# 16], Exhibit 18).

The Court notes that the complaint does not specifically allege that FERC was misled or defrauded by MHP's allegations. Rather, it states only that MHP's filing caused CNGT to amend its application:

> MHP's effort was met with initial success when CNGT filed on April 18, 1997, an amendment to its year-old application for the Seasonal Service Expansion Project, and sought phased consideration of the project out of concern that all of the authorizations requested would

> not be granted in time for the 1997-1998 winter heating season. Under the amendment consideration of the BPSI proposal was to be deferred. Thus, it was clear that MHP and the other Defendants had been successful in delaying consideration by FERC of the use by CNGT of the Bath Storage Facility for the storage of natural gas.

(Complaint [# 1], P 85). However, plaintiff claims that MHP's actions ultimately caused CNGT to breach its lease with plaintiff. The complaint states that in January of 1998, CNGT informed plaintiff that "as a direct result of MHP's and CREST's[4] actions to thwart regulatory approval, it had determined to terminate the Lease Agreement with BPSI, which was finally accomplished in January 1998." Plaintiff admits, however, that on January 28, 1998, FERC dismissed CNGT's application, without prejudice, because of "serious data deficiencies" with CNGT's application, and because of CNGT's failure to respond to "FERC inquiries." (Complaint [# 1], P 87; Declaration of John P. Quinn [# 16], Exhibit 12).

b. The Proceeding Before New York's DEC

At the same time that the aforementioned proceedings were taking place before FERC, in November of 1996, the New York State DEC proposed to modify plaintiff's existing SPDES permit.[5] The proposed modification used the "mass balance" formula, a different formula than was previously used in calculating concentration levels of chlorides and other

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[4] Although the complaint alleges that defendant Coalition For Resources and Environment in the Southern Tier, Inc. (CREST) intervened in the FERC proceeding, it does not identify any statements that CREST allegedly made to FERC, none of the documents from the FERC proceeding refer to CREST, and CREST denies that it intervened in that action.

[5] As noted above, in its July 10, 1996 letter to FERC, the DEC stated that as a result of the proposed change in plaintiff's operations, it would required [sic] plaintiff to obtain a new SPDES permit.

wastes that plaintiff was discharging into the Cohocton River, which restricted plaintiff's ability to discharge salt-water brine into the river. Plaintiff alleges that the "mass balance" formula had never before been utilized by the New York DEC to measure compliance with water pollution standards, and that the formula made it virtually impossible for BPSI to discharge salt brine into the Cohocton River without subjecting itself to enforcement actions by the DEC for violation of the permit. Plaintiff alleges, upon information and belief, that this modification of its permit came about because MHP "induced" the DEC to make the modification. (Complaint, P 91) The complaint does not specifically say that MHP defrauded the DEC, or that MHP made misstatements to the DEC, thus it is unclear how MHP allegedly "induced" the DEC to do this. The complaint also states that MHP urged DEC to use the "mass balance" formula for plaintiff's permit, but it does not allege that MHP in any way defrauded DEC into doing this. (*See*, Complaint, P 109). In any event, plaintiff objected to the modification of its permit, causing DEC to conduct a modification proceeding. In February of 1997, two weeks after it was formed, a non-profit corporation named Coalition For Resources and Environment in the Southern Tier, Inc. ("CREST") filed a petition to intervene in plaintiff's modification proceeding before the DEC. Plaintiff contends that CREST was and is a sham corporation created by MHP and TPC, for the purpose of intervening in the modification proceeding, since "it is unlikely that MHP, as a competitor, would have been granted party status in the administrative proceeding." (Complaint [# 1], P 98). The complaint alleges that CREST made the following statements to the DEC:

> a. BPSI was guilty of having violated the terms of its existing SPDES permit by discharging huge quantities of brine into the Cohocton River;

b. These discharges have caused a significant negative impact on the fish population downstream in the Cohocton River;

c. The BPSI proposal would likely result in harm to the habitat of the timber rattlesnake, an endangered species;

d. As a consequence, a more thorough environmental impact study should be required;

e. The planned conversion to natural gas would create an increased threat of catastrophic explosion;

f. As a result of years of uncontrolled solutioning, BPSI's storage cavern facility has become dangerously unstable . . . . . ;

g. The environmentally unsafe use of the caverns could result in the release of explosive product into the prolific fresh water aquifers of the Cohocton River underlying the facility; [sic] Subsurface subsidence could result in full scale collapse of the underground salt cavern storage facilities resulting in uncontrolled release of the gas product;

i. Substantial geological faulting exists on the site creating an environmental hazard; [sic] During the period of 1994 to 1996, BPSI substantially exceeded the level of effluents permitted in its discharge into the Cohocton River under its SPDES permit. This has resulted in poor plant growth downstream; and

k. The design of the underground injection wells for brine disposal is scientifically flawed given the volume of brine which would be required to be discharged each day.

(Complaint, par. 93). Plaintiff states that these statements were "fraudulent, false, and misleading," because:

> a. BPSI explicitly followed the effluent limitations and monitoring requirements set forth in its SPDES permit . . . . . ;
>
> b. CREST has provided no evidence of any damage to fish in the Cohocton River. Rather, studies commissioned by BPSI prove that there has been no damage and, in fact, the only deterioration in river quality has been the result of other point sources;
>
> c. studies and surveys have yet to reveal the existence of the timber rattlesnake at the property in question;
>
> d. Adequate and complete environmental studies were conducted and there is no rational basis for requiring additional tests or studies;
>
> e. The planned conversion to natural gas would not in any manner create an increased threat of catastrophic explosion and in fact, natural gas is safer to handle than LPG. . . . ;
>
> f. There is no evidence of uncontrolled solutioning of caverns which would permit the migration of gases. In fact, all studies demonstrate the continued integrity of the individual caverns which have not expanded to any significant degree in the entire time the facility has been utilized. . . . ; ,
>
> g. There is no rational basis for contending that BPSI caverns pose any danger to fresh water aquifers which are located approximately one-half mile above the storage caverns. Moreover, LPG and natural gas are not even considered potential pollutants to water by the EPA and [is] not included on its list of pollutants;

h. Testing unequivocally demonstrates that significant surface subsidence at this location is a practical impossibility;

i. There is no evidence of geological faulting. . . . ;

j. BPSI has fully complied with the sampling and monitoring requirements of its SPDES permit and damage to plant life, if any, cannot be shown to be a result of BPSI's discharges into the Cohocton River;

k. Tests show that the successful use of an underground injection well is feasible at this location. Even were it not, the only risks involved with the use of such a well are economic not environmental.

(Complaint, par. 94). Plaintiff claims that the affidavits and studies submitted by CREST were actually prepared by MHP's engineering firm. In March of 1997, CREST was allowed to intervene in the modification proceeding. Plaintiff claims that at the administrative hearing, CREST had employees of MHP's engineering firm testify falsely concerning the risk of environmental damage from BPSI's gas storage facility. For example, plaintiff contends that one of the employees testified that the brine produced could contain oil and grease, when in fact that is not true. At the hearing, these employees of MHP's engineering firm admitted that they had done substantial work on MHP's Tioga project.

Plaintiff does not specifically state that DEC was defrauded by anything that CREST did. Rather, the complaint states only that "NYDEC staff had relied on the factual representations made by CREST and embarked on a proceeding that threatens BPSI's existing LPG storage business." (Complaint P 101). The complaint further states that "NYDEC has relied on the false, fraudulent and misleading statements and representations of MHP and as a result final action on [plaintiff's] permit has been delayed"

(Complaint P 104). However the complaint does not identify any particular action that the DEC allegedly took as a result of the actions of MHP or CREST. The complaint does not specifically allege that MHP defrauded the DEC, although it does allege that there was an improper working relationship between MHP and DEC, such that the DEC became a willing tool for MHP to use against plaintiff. The complaint states that "MHP has directly provided NYDEC information and various inappropriate methodologies which NYDEC has accepted and utilized to substantially impede the permitting process," and that the DEC "was participating actively as part of the Enterprise seeking to destroy BPSI's business." (Complaint P 105, 106). Moreover, the complaint alleges that the DEC intentionally withheld internal documents regarding plaintiff's permit from plaintiff, while providing the same documents to CREST. (Complaint P 107). In short, plaintiff claims that the DEC conspired with defendants to harm plaintiff.

On February 25, 1997, as part of the SPDES permit modification proceeding, DEC Administrative Law Judge Helene Goldgerger issued an "ALJ Ruling on Issues and Party Status." ([# 19], Exhibit A) In that decision, the ALJ rejected plaintiff's claim that MHP had "induced" the DEC to modify plaintiff's SPDES permit. In her decision, the ALJ acknowledged that DEC had received a complaint about plaintiff from an unidentified competitor, however, she also noted that prior to that, the DEC became concerned that plaintiff was exceeding its SPDES permit when it learned that plaintiff had applied to the Susquehanna River Basin Commission for permission to pump ground water for use in solutioning. The ALJ also considered and rejected plaintiff's contentions that CREST was a sham corporation, since CREST's petition "included information on members of the organization who live in Bath, on or near the Cohocton River and enjoy and use its resources," and that "at the legislative hearing, a number of individuals presented written

statements, gave oral testimony and signed registration cards acknowledging their interest in these proceedings and their affiliation with CREST." The ALJ ruled that CREST would be allowed to participate in the proceeding with regard to issues relating to the SPDES permit only, and that the other issues CREST had raised were more properly raised in other proceedings pending before the DEC and FERC. The ALJ's decision made no mention of MHP having participated in any DEC proceedings with regard to plaintiff's SPDES permit.

While the modification proceeding continued, the DEC brought another action against plaintiff for violating its SPDES permit. As with the earlier action, plaintiff claims that this action by DEC was baseless. The complaint states that in March 1997, the DEC filed a $14.5 million enforcement action against plaintiff for violating its SPDES permit, "despite the knowledge of its personnel that [plaintiff] had accurately monitored discharges in accordance with the requirements of its SPDES permit." (Complaint P 109).

On March 26, 1997, in connection with the permit modification proceeding, the DEC issued an Interim Decision of the Deputy Commissioner. ([# 19], Exhibit B) The decision noted, in relevant part, that the DEC appeared to have good cause for initiating the change to plaintiff's SPDES permit, since it appeared to "have evidence that giving rise to a concern that BPSI is discharging brine derived from expansion of caverns, in addition to water derived from routine ground water infiltration, thereby apparently exceeding the scope of the project as described in the application." With regard to plaintiff's objections to the "mass balance" formula, the Deputy Commissioner stated that "a mass balance analysis is hardly a 'theoretical' or 'unsubstantiated technique,' as BPSI argues. It is a standard approach." (*Id.*)

When plaintiff commenced this action, the DEC had not yet made a final determination as to the modification of

plaintiff's SPDES permit. However, on August 28, 1998, the DEC issued a Decision of the Deputy Commissioner, which ruled that plaintiff's SPDES permit would be modified, and that the "mass balance" formula would be used to monitor plaintiff's compliance. ([# 48], Exhibit A). That decision stated, in relevant part, that "the facts fully justify requiring [plaintiff] to increase its reporting activity under the SPDES permit, which is what the reclassification accomplishes. Likewise, the mass balance formula modification is appropriate under the facts. It appears that the applicable water quality criteria for total dissolved solids and chlorides have been exceeded on at least a few occasions as a result of [plaintiff's] activities, and the proposed mass balance approach will aid in avoiding recurrences of water quality standards violations." (*Id.*)

In addition to the proceedings regarding plaintiff's SPDES permit, plaintiff also had an application pending before the DEC to modify its underground salt cavern storage permit. Plaintiff alleges that the DEC refused to act upon this application until such time as plaintiff provided sonar soundings for each existing well. Plaintiff claims that such sonar soundings are "prohibitively expensive." (Complaint P 111). Plaintiff further contends that sonar soundings are not required under the existing regulations and that they have never been required in the past as a condition precedent to consideration of a permit application. Plaintiff alleges that in imposing this requirement, the DEC was again acting at the behest of "MHP or its affiliates." (*Id.*, P 112). The complaint acknowledges that the sonar requirement may have been suggested by the Interstate Oil and Gas Compact Commission ("IOGCC"), although plaintiff claims that this organization is "controlled" by TPC. (Complaint P 113). However, plaintiff admits that DEC "invited input" from the IOGCC, and that the Director of DEC's Minerals Division, sits on the IOGCC's governing board. (*Id.*)

c. The Proceeding Before the EPA

As part of the proposed project between plaintiff and CNGT, plaintiff intended to dispose of a portion of the salt-water brine produced by mining, by injecting it into underground wells. Accordingly, plaintiff applied for underground injection control permits from the U.S. Environmental Protection Agency (EPA). MHP, CREST, and the New York DEC opposed this application. The complaint alleges that on May 1, 1997, MHP filed comments with EPA opposing the application and requesting a public hearing. In opposing plaintiff's application, MHP allegedly stated that:

> a. The draft permits disregarded evidence of underground faulting at the Bath site and other geological and engineering problems that could cause migration of fluids or natural gas from the well bores, cavern or disposal zones into overlying formations and Underground Sources of Drinking Water ("USDWs");
>
> b. BPSI storage caverns do not conform to U.S. Government endorsed design and construction specifications propounded by the IOGCC;
>
> c. Because of the proximity of the proposed wells to existing drinking water wells and USDWs, any evidence of geological problems or safety or design problems with the wells are cause for serious concern;
>
> d. Neither FERC nor NYDEC is satisfied with BPSI's geological stability or well design data;
>
> e. Because disposal of significant quantities of waste brine in underground formations in the Western New York portion of the Appalachian Basin at the pressure limitations imposed in the Class IID draft permits has been demonstrated to be infeasible, there is no basis for issuing final permits;

f. The monitoring requirements in the draft Class IID permit are inadequate;

g. BPSI's Class III draft permit is predicated upon apparent misinformation regarding the intended purpose of the wells; and

h. EPA's proposal to regulate BPSI's brine disposal in Class IID wells is unlawful because it treats BPSI differently than similarly situated parties.[6]

(Complaint P 115). Plaintiff states that these statements by MHP were false, because:

a. There is no evidence of faulting or widespread evidence of cavern ceiling collapses at the Bath Storage Facility;

b. The stated IOGCC guidelines relating to domal salt cavern construction have no applicability to stratified salt formations;

c. MHP's claim that the geology of the region precludes BPSI from demonstrating an ability to dispose of brine into deep injection wells at the proposed disposal rates, is erroneous and not based upon any scientific data applicable to the Bath Storage Facility site; and

d. MHP's attempt to distinguish between "low pressure" storage of LPG and natural gas are and will be stored in the salt caverns at the same pressure.

(Complaint P 118). On April 28, 1997, CREST also filed comments with the EPA, that essentially mirror the comments CREST made to the DEC. (Complaint P 120). In May of 1997, the New York DEC also filed comments in opposition to plaintiff's application. The complaint does not allege that

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[6] The "similarly situated" party is MHP, which had been issued a more restrictive permit for its Tioga project.

EPA was defrauded by any of these statements, or that EPA did anything as a result of these statements by MHP and CREST.[7]

On August 25, 1998, after this action was commenced, the EPA issued a final permit decision, granting plaintiff's application. The decision concluded, inter alia, that there was no geologic faulting at the site which would affect the safety of the project. The EPA decision stated, in relevant part:

> Geophysical data submitted to EPA regarding potential of faulting in the area of the Bath project does not substantiate the existence of faults that would serve as conduits of fluids from the Class IID injection zones to the USDWs. After examining the geophysical data provided by MHP, EPA concluded that there is no evidence of faulting of the confining layers above the Class IID injection zone. The most likely cause of the MHP described "thrust vault" within the central portion of the seismic line . . . is due to processing error of the weathering zone; this portion of the seismic line coincides with thick unconsolidated low velocity Pleistocene deposits, . . . If a fault does exist in the salt section, the fault is most likely a sealed fault; salt is plastic and self healing. If a fault exists within the salt section, it may not compromise the confining properties of this section.

([# 48], Exhibit B)

d. The Avoca Project and the NYSEG Seneca Lake Project

In addition to the foregoing, and in an attempt to show a pattern of racketeering activity by defendants, plaintiff claims

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[7] In Count VII of the complaint dealing with the claim for common law fraud, the complaint makes a conclusory assertion that "NYDEC, FERC and the EPA relied upon those representations and as a result, took actions which damaged BPSI" (Comp par 191), however the complaint does not allege what those "actions" were or how they injured plaintiff.

that defendants also defrauded other administrative agencies which were considering applications from two of defendants' competitors who are not parties to this action. The first of these was the Avoca Project, and the second was the New York State Electric & Gas Corporation's ("NYSEG") Seneca Lake Project. Plaintiff claims that in February 1995, while TPC and MHP were working on their Tioga Storage Facility, they formed a sham environmental corporation called Concerned Citizens of the Cohocton Valley ("CCCV"), for the purpose of promoting the Tioga project and attacking any competitors' projects. Shortly thereafter, one such competitor, Avoca Natural Gas ("Avoca"), began work on a competing gas storage facility near defendants' Tioga facility. Avoca filed an application with FERC for a certificate to develop, construct and operate an underground gas storage field in Avoca, New York. Plaintiff alleges that in April of 1996, MHP sought leave to intervene in the proceeding, and filed materially misleading comments, however, the complaint does not identify these alleged comments. In April of 1997, CCCV also moved to intervene in Avoca's proceeding before FERC, and allegedly filed false and misleading statements as well. However, these allegedly false statements by CCCV pertained not to the Avoca project itself, but to plaintiff's project in Bath. CCCV essentially urged FERC, when considering Avoca's application, to also consider the effects that the Bath project would have on the environment, CCCV urged FERC to consider the cumulative effects that the two projects would have, rather than considering Avoca's application in isolation. (Complaint, P 65(g)). CCCV allegedly told FERC that the Bath project could not discharge brine from solution mining into the Cohocton River under its then-existing SPDES permit, and that because of environmental damage that had already occurred, it was unlikely that plaintiff would be allowed to discharge brine from solution mining into the river. CCCV also allegedly told FERC that the DEC had ordered plaintiff to halt its

solutioning activities, and was seeking fines from plaintiff for violating its SPDES permit. The complaint states that CCCV's efforts were "successful," because one month after CCCV filed its comments with FERC, Avoca abandoned the project and went bankrupt. The complaint does not specifically allege that FERC was defrauded, or that the alleged misstatements by CCCV caused Avoca to abandon its project. It also does not allege that these statements by CCCV or MHP caused a delay in the FERC proceeding, or that FERC did anything as a result of the alleged misstatements. Another of defendants' competitors, NYSEG, had an application pending before FERC with regard to a project known as the Seneca Lake Storage Project. Plaintiff contends that on February 7, 1997, MHP intervened in the proceeding before FERC, and stated that NYSEG would need FERC approval for a particular aspect of its project. The complaint states that FERC disagreed with MHP, but it does not state that FERC was defrauded or that NYSEG was injured as a result. (Complaint, PP 129-31).

e. The Subject Action

Plaintiff commenced this action on March 31, 1998, by way of the subject complaint, which sets forth seven causes of action. For the first and second causes of action, plaintiff claims that all defendants have violated the Racketeer Influenced and Corrupt Organizations (RICO) statute, 18 U.S.C. § 1961 *et seq*. The complaint alleges that all defendants are "part of an associated in fact enterprise . . . , within the meaning of 18 U.S.C. § 1961(4)." (Complaint [# 1], P 6), and that they have each violated the RICO statute in two respects. First, plaintiff claims that each defendant has "conducted or participated, and continues to conduct or participate, directly or indirectly, in the conduct of such Enterprise's affairs through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c)." (Complaint [# 1], P 6). Second, plaintiff contends that each defendant has "conspired to violate 18 U.S.C. § 1962(c), by agreeing to participate in

the affairs of such Enterprise through the commission of, or through aiding and abetting the commission of, a pattern of racketeering activity involving numerous acts of mail and wire fraud." (*Id.*) In support of these contentions, the complaint states, that from the actions of MHP, CREST, and TPC, "an agreement to commit those acts [mail and wire fraud] can be fairly implied." (Complaint [# 1], PP 125-27). Plaintiff alleges that while the defendants appear to be separate entities, they are in fact all associated with and are part of TPC.[8] In this regard, the plaintiff claims that TPC controls the board of directors and officers of Market Hub Partners, Inc., which operates as TPC's alter-ego. Plaintiff contends that defendants want to eliminate any competing underground gas storage facilities, so that its facility in Tioga Pennsylvania will be the only such facility in interstate commerce in the northeastern United States. Plaintiff alleges that defendants' activities constitute a pattern which will likely continue. As evidence of this, plaintiff points to the Avoca Project and the Seneca Lake Storage Project, and contends that defendants have used the same unlawful tactics against these other competitors. Plaintiff alleges that even though its lease with CNGT has been terminated, that it still owns a gas storage facility and that it likely that the defendants will continue to engage in fraudulent campaigns against BPSI in its efforts to compete with MHP in the gas storage business.

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[8] TPC is a Delaware corporation with its principal place of business in Houston, Texas, and it is the largest owner of natural gas salt cavern storage facilities in the United States. In 1994, TPC performed a limited partnership called Market Hub Partners, LP. The limited partnership consists of five limited partners and one general partner. The five limited partners are: TCP, Nipsco Industries, Inc., New Jersey Resources, Corp., DPL, Inc., and Public Service Enterprise Group. The general partner is Market Hub Partners, Inc., whose stock is owned by the aforementioned five limited partners of Market Hub Partners, LP.

As for the third cause of action, plaintiff alleges that MHP and TPC violated § 2 of the Sherman Act, 15 U.S.C. § 2, in that through the use of these fraudulent activities before FERC, DEC, and EPA, they have attempted to monopolize underground storage of high deliverability of natural gas in the northeastern United States. The plaintiff alleges that the activities of MHP and TPC were in bad faith and were nothing more than an attempt to interfere with the business of a competitor.

As for the fourth cause of action, plaintiff alleges that MHP and TPC violated § 340 of the New York's General Business Law as a result of their attempts to monopolize the underground storage of high deliverability of natural gas in New York and to otherwise restrain the exercise of competition in violation of § 340 of New York's General Business Law. For the fifth cause of action, plaintiff also alleges that all defendants have violated § 349 of New York's General Business Law because they made statements to the administrative agencies that were false and deceptive and misleading in a material way and would tend to mislead a reasonable consumer. For the sixth cause of action, plaintiff alleges that all the defendants have tortiously interfered with its lease agreement with CNGT. Finally, plaintiff alleges that all of the defendants have engaged in common law fraud, in that they made materially false representations to the New York DEC, the FERC, and the EPA, which were known to be false when made, and that the New York DEC, the FERC, and the EPA relied upon those representations and as a result, took actions which damaged plaintiff. Plaintiff further alleges that the defendants acted maliciously, willfully, wantonly, and with reckless disregard for plaintiff's rights, and accordingly, plaintiff is seeking punitive damages. In addition to monetary damages, the plaintiff is seeking a permanent injunction enjoining the defendants from "continuing their fraudulent schemes directed against [plaintiff]."

Instead of answering the complaint, all defendants moved to dismiss. On May 22, 1998, MHP moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted [# 13]. The motion is based upon several grounds. First, MHP contends that plaintiff has failed to allege a direct, "but for" and proximate causal relationship between anything it did and plaintiff's alleged injuries. Rather, MHP contends that any injury suffered by plaintiff is a result of CNGT canceling its lease with plaintiff. MHP contends that plaintiff's injury, if any, was caused only by CNGT's cancellation of the lease agreement, and not because of any statements made by the defendants to the various regulatory agencies. Second, MHP contends that it is shielded from any liability by the First Amendment and the *Noerr-Pennington* doctrine. Third, MHP contends that plaintiff has failed to allege fraud with particularity, as required by Fed.R.Civ.P. 9(b). More specifically, MHP alleges that the complaint makes only conclusory allegations of fraud, and does not identify any specific fraudulent statements by defendants. Fourth, and in the alternative, MHP moves to have any claims that are not dismissed referred to either the FERC, the EPA, or the New York DEC. MHP alleges that since plaintiff's claims concern technical, geological, environmental, engineering and regulatory policy and fact issues that are within the primary jurisdiction of the FERC, the EPA, and the New York DEC, that this Court should abstain from determining those issues. On May 27, 1998, CREST moved to dismiss [# 19] pursuant to Fed.R.Civ.P. 12(b)(6), for essentially the same reasons as MHP, i.e., failure to adequately plead causation, failure to adequately plead fraud, *Noerr-Pennington* doctrine, and that these matters should be heard by the various regulatory agencies, who have more expertise in these areas. CREST claims that it never intervened in CNGT's application proceeding before the FERC, and that it never made any submissions to the FERC regarding CNGT's application. In

addition, CREST claims that plaintiff's action is barred by Section 76-a of the New York Civil Rights Law, which states in relevant part that

> "in an action involving public petition and participation, damages may only be recovered if the plaintiff, in additional to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue."

CREST argues that there is adequate support in the record for the opinions and statements which it made in regard to plaintiff and CNGT, and therefore, plaintiff cannot recover damages against it. CREST argues that plaintiff should be estopped from claiming that CREST is a "sham" organization, since the DEC ALJ has already ruled that CREST is not a sham. CREST further argues that since plaintiff never appealed that ruling by the ALJ, that it should be estopped from raising that claim in this action. CREST also argues that plaintiff has failed to exhaust its administrative remedies, because it did not appeal the ALJ's ruling. In addition, CREST argues that the plaintiff cannot proceed under New York's General Business Law § 349 because this is not a "consumer oriented transaction," and its actions were not directed to consumers. Finally, CREST argues that there has been no tortious interference with the plaintiff's contract by CREST, since there has been no showing of any communication from CREST to CNGT. On June 11, 1998, defendant TPC also moved to dismiss the complaint pursuant to Fed.R.Civ.P. 12(b)(1), 12(b)(6) and 9(b). TPC contends that the claims against it should be dismissed since it did not make any of the statements complained of, and none of the statements of MHP or CREST

can be imputed to it. Moreover, TPC states that plaintiff has failed to state a claim with respect to each and every cause of action. The Court has thoroughly considered the parties' written submissions, as well as the oral arguments of counsel.

ANALYSIS

It is well settled that in determining a motion under Fed.R.Civ.P. 12(b)(6), a district court must accept the allegations contained in the complaint as true and draw all reasonable inferences in favor of the nonmoving party. *Burnette v. Carothers*, 192 F.3d 52, 56 (1999). While the Court must accept as true plaintiff's factual allegations, "conclusory allegations of the legal status of the defendants' acts need not be accepted as true for the purposes of ruling on a motion to dismiss." *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092 (2d Cir.1995)(citing *In re American Express Co. Shareholder Litig.* (*Lewis v. Robinson*), 39 F.3d 395, 400-01 n. 3 (2d Cir.1994). The Court "may dismiss the complaint only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* (internal quotations omitted)(citing *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957)).

Noerr-Pennington Doctrine

The *Noerr-Pennington* doctrine provides that activities directed toward influencing governmental action, such as litigation and lobbying, are immunized from antitrust liability, unless such activities are shown to be a mere sham. *Professional Real Estate Investors v. Columbia Pictures Indus.* [1993-1 TRADE CASES ¶ 70,207], 508 U.S. 49, 56-57, 123 L.Ed.2d 611, 113 S.Ct. 1920 (1993). In creating the *Noerr Pennington* doctrine, the United States Supreme Court recognized that such litigation and lobbying would at times involve disputes between business competitors:

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.

California Motor Transport Co. v. Trucking Unlimited [1972 TRADE CASES ¶ 73,795], 404 U.S. 508, 510-511, 30 L.Ed.2d 642, 92 S.Ct. 609 (1972). The sham exception to the *Noerr Pennington* doctrine provides that "activity ostensibly directed toward influencing governmental action does not qualify for *Noerr* immunity if it is a mere sham to cover an attempt to interfere directly with the business relationships of a competitor." *Professional Real Estate Investors*, 508 U.S. at 51 (internal quotations omitted). Essentially, a defendant's activities are a sham where they are frivolous and instituted solely for the purpose of injuring, harassing or delaying the opponent. In *Professional Real Estate Investors* ("*PRE*"), the Supreme Court established a two-pronged test for establishing the sham exception to the *Noerr-Pennington* doctrine: a party must demonstrate 1) that the activities were "objectively baseless in the sense that no reasonable litigant could realistically expect success on the merits" and 2) that the baseless activity conceals "an attempt to interfere directly with the business relationships of a competitor, through the use of the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon." *PRE*, 508 U.S. at 60-61. A finding that a defendant had probable cause to institute legal proceedings ends the inquiry, regardless of defendant's subjective intent. *Id.* at 62. Where there is no dispute over the predicate facts of the underlying legal proceeding, the court may decide probable cause as a matter of law." *Id.* at 63. The Supreme Court noted that "[a] winning lawsuit is by definition a reasonable effort at petitioning for redress and therefore not a sham." *Id.* at n. 5. Recognizing

that judgments obtained by fraud can be set aside, the Court also stated that it was declining to decide "whether and, if so, to what extent *Noerr* permits the imposition of . . . liability for a litigant's fraud or other misrepresentations." *Id.* at p. 61, n. 6. Other courts have held that a party's misrepresentations to a court can constitute a sham, for purposes of *Noerr Pennington*, where "a party's knowing fraud upon, or its intentional misrepresentations to, the court deprive the litigation of its legitimacy." *Kottle v. Northwest Kidney Centers* [1998-1 TRADE CASES ¶ 72,185], 146 F.3d 1056, 1060 (9th Cir.1998), *cert denied*, 525 U.S. 1140, 119 S.Ct. 1031, 143 L.Ed.2d 40 (1999). However, a plaintiff should not be allowed to invoke the sham exception in this manner by "simply recasting disputed issues from the underlying litigation as 'misrepresentations' by the other party." *Oregon Natural Resources Council v. Mohla*, 944 F.2d 531, 536 (9th Cir.1991). Where a party has in fact made misrepresentations, to invoke the sham exception they must be material misrepresentations. *See, Cheminor Drugs, LTD. v. Ethyl Corp.* [1999-1 TRADE CASES ¶ 72,456], 168 F.3d 119, 124 (3rd Cir.1999), *cert denied*, 145 L.Ed.2d 146, 120 S.Ct. 173 (1999). Where, as here, the plaintiff claims that defendant's actions were a sham because defendants made misrepresentations, the Court should examine

> the outcome of the proceedings, including findings made by the relevant administrative tribunals, the nature of the particular allegations of the petition or actions before the administrative agency claimed to be fraudulent or improper, and whether these claimed misrepresentations or improper actions would have been significant to the ultimate outcome or continuation of the proceeding.

Music Center S.N.C. Di Luciano Pisoni & C. v. Prestini Musical Instruments Corp. [1995-1 TRADE CASES ¶ 71,003], 874 F.Supp. 543, 549 (E.D.N.Y.1995); *Cheminor*

Drugs, LTD., 168 F.3d at 123-24. The *Noerr-Pennington* doctrine is applicable in antitrust actions and RICO actions. *See, International Bhd. of Teamsters, Local 734 Health and Welfare Trust Fund v. Philip Morris Inc.* [2000- 1 TRADE CASES ¶ 72,754], 196 F.3d 818, 826 (7th Cir.1999) ("Although the *Noerr-Pennington* doctrine originated in antitrust law, its rationale is equally applicable to RICO suits.") There is no "government conspiracy" exception to *Noerr Pennington. City of Columbia v. Omni Outdoor Advertising, Inc.* [1991-1 TRADE CASES ¶ 69,378], 499 U.S. 365, 383, 113 L.Ed.2d 382, 111 S.Ct. 1344 (1991)(rejecting the idea of a " 'conspiracy' exception, which would apply when government officials conspire with a private party to employ government action as a means of stifling competition.")

Plaintiff claims that the Court should not consider a motion to dismiss based upon *Noerr Pennington* until after plaintiff has completed discovery. (Plaintiff's Memorandum of Law [# 33], p. 14). However, the Court disagrees. As was held in *Music Center S.N.C.*, 874 F.Supp. at 549.

> [a] rule permitting discovery, based solely on allegations of misrepresentation in a petition, would fail to recognize that an inaccurate petition, even one containing deliberate misstatements, might nonetheless not be so lacking in merit as to be objectively baseless.
>
> * * * *
>
> To allow antitrust claims based solely on broad and indistinct allegations of misrepresentation and 'sham litigation' to reach discovery, regardless of the role the claimed misrepresentations played, or could have played, in the prior proceeding, would predicate the viability of an antitrust complaint on a petitioner's subjective intent, and not the objective merit of its petition, and thus directly contravene the Supreme

> Court's holding in *PRE*. Moreover, such discovery would have the effect of encouraging antitrust 'strike suits,' and effectively chill the First Amendment rights which *Noerr* immunity was intended to protect.

(citations omitted). As noted above, in addition to considering plaintiff's complaint, the Court may also consider the various documents from the underlying administrative proceedings, since plaintiff had notice of these proceedings and bases its action upon those proceedings. *See, Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir.1993).[9] Thus, in ruling upon defendants' motions, the Court here need not rely solely upon plaintiff's characterizations of the proceedings before FERC, DEC, and EPA, but rather, the Court can and does conduct its own examination of those proceedings.

The FERC Proceeding

The Court finds that defendants' actions before FERC were not objectively baseless. First, the Court notes that MHP did not initiate the proceeding before FERC, but rather, MHP responded to a public notice issued by FERC, which invited any person desiring to be heard to file comments or protests. Then, even before MHP filed comments, the New York DEC sent a letter to FERC raising numerous concerns with CNGT's application, including concerns over the potential environmental impact of the project. Moreover, DEC noted that it intended to require plaintiff to obtain a new SPDES permit. Thus, while plaintiff blames MHP for raising fraudulent environmental concerns, the fact is that the New York DEC brought these issues to FERC's attention before MHP filed any papers with FERC. With regard to MHP's

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[9] Although plaintiff objects to the Court considering these documents on a 12(b)(6) motion, it does not attempt to distinguish *Cortec Industries, Inc. v. Sum Holding L.P.*, 949 F.2d 42 (2d Circuit 1991) or *Brass v. American Film Technologies, Inc.*, 987 F.2d 142, 150 (2d Cir.1993).

first objection, filed on August 15, 1996, most of the objection centered around MHP's request that FERC issue a cease and desist order against plaintiff's unlawful solution mining. Plaintiff's complaint does not mention this fact, nor does it claim that MHP's objection was baseless. This is understandable, since FERC agreed with MHP and determined that plaintiff could not continue to develop its salt caverns without FERC's approval. Clearly, this portion of MHP's objection was not objectively baseless. Part of that objection did express concern over the safety of plaintiff's project, based upon the fact that plaintiff had experienced a fire and tubing failures at its site. However, it appears undisputed that plaintiff did experience problems with its number 2 and 2a wells, and did have an explosion and fire.[10] Accordingly, MHP's first objection filed with FERC was not baseless. MHP's second objection, filed on August 28, 1996, dealt exclusively with the rates that CNGT had proposed to charge its customers. Again, plaintiff does not claim that this objection was baseless. On December 26, 1996, MHP filed a third objection. Half of that objection again addressed the project's proposed cost and the rates to be charged by CNGT. Plaintiff does not object to those assertions, nor does it claim that they were baseless. However, the other half of that objection claimed that MHP had evidence of a geological fault at plaintiff's site. To support this claim, MHP submitted affidavits and test results from geologists. In response, CNGT denied that there was a geological fault at the site, and it provided affidavits and studies from its own geologists to support that claim. (*See*, Letter from CNGT to FERC, Declaration of John Quinn [# 16], Exhibits 16-17) MHP also

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[10] The Court notes that Hon. Thomas W. Keegan, Justice of the Supreme Court, Albany County, in a Decision and Order dated January 29, 1997, in an Article 78 proceeding initiated by plaintiff, referred to the fact that plaintiff itself had stated that it had "problems with tubing failures at Well No. 2," and had applied to the DEC for a permit to drill a replacement well.

expressed concerns over the stability and suitability of the site for use in storing natural gas. MHP raised concerns over possible environmental damage from solution mining, and expressed the view that plaintiff had violated its SPDES permit on various occasions. Plaintiff claims that these objections was baseless and fraudulent. However, the record supports at least some of these claims. For example, plaintiff does not deny that its cavern design deviated from the IOGCC's design standards, as MHP claimed, nor does it deny that there was at least some possibility of a catastrophic explosion at its site. Moreover, as noted above, it does appear that plaintiff had a fire at its site, as well as problems with two of its wells. Moreover, even if MHP's claims were not true, there is no indication that those statements had any effect on the duration or outcome of the FERC proceeding. Rather, it is clear that FERC dismissed CNGT's application, without prejudice, because CNGT had failed to provide information which FERC had repeatedly requested. When it dismissed CNGT's application, FERC did not state that its action was in any way related to anything that MHP had done, nor did it indicate that its dismissal was related to any concerns that MHP had raised. As for defendant CREST, while plaintiff claims that CREST intervened in the FERC proceeding, there is nothing in the record to support that claim, and plaintiff has not identified any statements that CREST allegedly made to FERC. Based upon the fact that many of defendant's objections are not being challenged here by plaintiff, and that there was a factual basis for many of defendants' claims, the Court finds that defendants had probable cause for their objections. Accordingly, the Court finds that plaintiff cannot demonstrate that defendants' actions before FERC were objectively baseless.

The DEC Proceeding

The Court also finds that defendants' activities in the DEC proceedings were not objectively baseless. As with the FERC

proceeding, the DEC proceeding was not initiated by any of the defendants. Rather, the DEC itself initiated the modification of plaintiff's SPDES permit. Plaintiff alleges that the DEC "relied on the factual representations made by CREST and embarked on a proceeding that threatens [plaintiff's] existing LPG storage business" (Complaint [# 1], P 101). However, CREST did not even exist at the time the DEC initiated the modification proceeding. According to the complaint, the DEC initiated the permit modification and proposed the mass balance formula in November of 1996. CREST was not formed until January of 1997. (Complaint [# 1], PP 90, 92). Moreover, the ALJ determined that DEC initiated the modification proceeding, not because of defendants, but because it had learned that plaintiff had applied to the Susquehanna River Basin Commission for permission to pump ground water for use in solution mining. Obviously, that would have created a concern on the DEC's part that plaintiff was engaging in activities that would increase its discharge of salt water brine. Moreover, the ALJ specifically rejected plaintiff's claim that CREST was a sham organization. Once CREST was allowed to intervene in the proceeding, the ALJ ruled that CREST could only raise issues relating to the SPDES permit. Therefore, most of the statements in CREST's papers were not even considered by the ALJ. For example, the claims relating to rattlesnake habitat, geologic faulting, and unstable mines were not considered by the ALJ, and consequently those claims could hot have affected the outcome of the proceeding. Ultimately, DEC did modify plaintiff's permit, finding that the mass balance formula was appropriate. The DEC rejected plaintiff's claim that the "mass balance" formula was a novel idea suggested by defendants. Rather, the DEC stated that the "mass balance" formula was "a standard approach." Moreover, the DEC determined that plaintiff had violated its SPDES permit "on at least a few occasions." ([# 48], Exhibit A). Accordingly, there is nothing to indicate that defendants'

statements in the SPDES modification proceeding were objectively baseless.

With regard to plaintiff's separate application to modify its underground salt cavern storage permit, there is also no indication that defendants raised any objectively baseless claims. Plaintiff claims only that MHP suggested to DEC that it require plaintiff to conduct sonar testing of its wells. However, even if that were true, that does not get around the *Noerr Pennington* doctrine. As noted above, there is no government conspiracy exception to *Noerr Pennington*. *See, City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. at 383. Therefore, while plaintiff makes numerous allegations that defendants and DEC acted together to hinder plaintiff, plaintiff cannot demonstrate that defendants' actions were a sham.

The EPA Proceeding

The Court similarly finds that defendants' actions before the EPA were not objectively baseless. After plaintiff applied to the EPA for underground injection control permits, MHP and CREST filed comments with EPA. The DEC also filed comments. MHP and CREST's submissions raised the same structural and environmental concerns that they had raised before the FERC and the DEC. According to the EPA's report, comments were also received from numerous individuals and organizations other than MHP and CREST. After considering all of the comments it received, the EPA granted plaintiff's application. With regard to the concerns defendants expressed over possible pollution of drinking water, the EPA stated that its permits were designed to protect drinking water supplies. However, the EPA did not state that this concern was frivolous or baseless. While the EPA also found that plaintiff's well design and geologic stability were satisfactory, it did not state that defendants' objections were baseless. Moreover, while the EPA found

that there was no "hard evidence" of geologic faulting, it did not state that MHP and CREST's comments in that regard were baseless or frivolous. Rather, the EPA stated that defendants' evidence of a geologic fault may have been caused by a "processing error," which may have created the appearance of faulting. ([# 48], Exhibit B). Therefore, while defendants did not "prevail" in the EPA proceeding, there is no indication that defendants' opposition to the issuance of the permit was objectively baseless. *See, generally, Envirosource, Inc. v. Horsehead Resource Dev. Co., Inc.*, 1996 U.S. Dist. LEXIS 9099, No. 95 CIV. 5106 (AGS) 1996 WL 363091 (S.D.N.Y. Jul. 1, 1996); *Mover's & Warehousemen's Assoc. of Greater New York v. Long Island Moving & Storage Ass'n, Inc.*, 1999 U.S. Dist. LEXIS 20667, No. 98 CV 5373(SJ) 1999 WL 1243054 at *6 (E.D.N.Y. Dec. 16, 1999); *Omega Homes, Inc. v. City of Buffalo* [1998-1 TRADE CASES ¶ 72,174], 4 F.Supp.2d 187, *aff'd*, [1999-1 TRADE CASES ¶ 72,483], 171 F.3d 755 (2d Cir.1999), *cert denied*, 145 L.Ed.2d 151, 120 S.Ct. 179 (1999).

Based upon all of the foregoing, the Court finds that defendants are entitled to *Noerr Pennington* immunity for any claims arising out of their activities in the administrative proceedings before FERC, DEC, and EPA. Furthermore, since all of plaintiff's claims in this action are based upon the statements that defendants made to those agencies, those claims are all barred by the *Noerr Pennington* doctrine. Accordingly, the Court finds that the complaint should be dismissed in its entirety pursuant to Fed.R.Civ.P. 12(b)(6).

Failure to State a Claim

Although the Court has determined that the complaint must be dismissed pursuant to the *Noerr Pennington* doctrine, the Court also notes that even if plaintiff's claims were not barred by *Noerr Pennington*, plaintiff has failed to state a claim, since it has failed to plead any facts demonstrating that

defendants' statements caused injury. There is a causation element for claims under both RICO and the Sherman Act. The United States Supreme Court in *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268, 117 L.Ed.2d 532, 112 S.Ct. 1311 (1992), held that a claims under RICO, 28 U.S.C. § 1964, require a showing of both "but for" causation and proximate causation. The Court in *Holmes* noted that proximate causation requires that there be "some direct relation between the injury asserted and the injurious conduct alleged." *Id.* With statutory claims, such as claims under RICO and the Sherman Act, the issue is whether or not a plaintiff is in the category of persons which the statute seeks to protect, and whether or not the harm that occurred was the "mischief" the statute seeks to avoid. *Abrahams v. Young & Rubicam, Inc.*, 79 F.3d 234, 237 (2d Cir.1996). The Second Circuit has held that

> central to the notion of proximate cause is the idea that a person is not liable to all those who may have been injured by his conduct, but only to those with respect to whom his acts were a substantial factor in the sequence of responsible causation, and whose injury was reasonably foreseeable or anticipated as a natural consequence.

First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 769 (2d Cir.1994), *cert denied*, 513 U.S. 1079, 130 L.Ed.2d 632, 115 S.Ct. 728 (1995). Claims under New York's antitrust statute, General Business Law § 340, also require proximate causation, *Van Dussen-Storto Motor Inn, Inc. v. Rochester Telephone Corp.* [1978-2 TRADE CASES ¶ 62,253], 63 A.D.2d 244, 252, 407 N.Y.S.2d 287 (4th Dept.1978)("Plaintiff must allege a causal link to its injury which is direct rather than incidental or remote"), as do claims under New York General Business Law § 349. *Schneider v. Citicorp Mortgage, Inc.*, 982 F.Supp. 897, 903 (E.D.N.Y.1997)(Plaintiff must show that its injury was

caused by defendant's deceptive acts). Plaintiff's claims for tortious interference with contract and fraud also require a showing of proximate causation. *Jabbour v. Albany Medical Center*, 237 A.D.2d 787, 790, 654 N.Y.S.2d 862 (3d Dept.1997); *Cofacredit, S.A. v. Windsor Plumbing Supply Co., Inc.*, 187 F.3d 229, 239 (2d Cir.1999). Here, the Court finds that defendants' actions were not the proximate cause of plaintiff's injury.

As noted above, plaintiff claims that it was injured when CNGT breached its agreement with plaintiff. Plaintiff attempts to demonstrate causation by stating, in relevant part, that "in November of 1997 CNGT informed [plaintiff] that as a direct result of MHP's and CREST's actions to thwart regulatory approval, it had determined to terminate the Lease Agreement." (Complaint [# 1], P 86). However, apart from this conclusory statement, the complaint fails to demonstrate how defendants had any effect on the administrative proceedings, or how the administrative proceedings had any effect on CNGT's decision to breach its agreement with plaintiff. It is important to note that CNGT breached its agreement long before the DEC and EPA proceedings were ever completed. Therefore, there cannot be a causal connection between the outcome of those proceedings and CNGT's breach of the agreement. Nor has plaintiff pleaded any facts showing how anything that defendants said caused a delay in those proceedings, or otherwise contributed to CNGT's decision to breach the contract with plaintiff. The complaint states that CNGT amended its FERC application because it was concerned that it would not gain approval of its entire application in time for the coming winter heating season. (Complaint [# 1], P 85). However, the complaint does not state facts demonstrating any connection between MHP's objections and CNGT's amendment. Rather, the complaint states in conclusory fashion that "it was clear that MHP and the other Defendants had been successful in delaying consideration [of CNGT's application]." (*Id.*)

Plaintiff offers a hearsay statement by CNGT that "defendant's objections to the BPSI project was slowing FERC's approval of the overall expansion" (*Id.* P 88), however, the complaint does not allege any specific instance where defendants caused a delay. The complaint simply does not describe any action taken by FERC in response to defendant's objections. With regard to the DEC proceeding, the complaint likewise fails to allege a causal relationship between defendants and the actions of the DEC. Plaintiff admits that DEC initiated the permit modification, and that plaintiff itself initiated the proceeding to contest the modification. While plaintiff claims that CREST intervened in that proceeding for the purpose of delaying the proceeding, the complaint does not allege any facts showing that CREST: had any effect on the proceeding or its outcome. The same is true of the EPA proceeding. For example, plaintiff claims that in the EPA proceeding, "virtually every objection to the issuance of the EPA permits was rejected out of hand by the EPA." (Plaintiff's Opposition to Supplemental Decisions [# 51], p. 2) However, if those claims were in fact "rejected out of hand," they obviously could not have caused any significant delay in the EPA proceeding.

There were also numerous independent intervening causes which may have caused a delay in the proceedings. For example, the DEC intervened in the FERC proceeding and raised numerous concerns before defendants became involved. Moreover, many other individuals and groups besides defendants raised objections before the various administrative agencies. However, one intervening cause in particular stands out. The Court notes, based upon its review of the documents from the FERC proceeding, that it appears clear that much of any delay in the FERC proceeding was due to a miscalculation by plaintiff and CNGT. Specifically, plaintiff and CNGT believed that plaintiff could begin work on the cavern mining without first obtaining approval from FERC. (*See*, Complaint [# 1], P 34, Exhibit 1, P 6; letters

from FERC to CNGT, Declaration of John P.Quinn [# 16], Exhibits 5, 6). However, as noted above, MHP sought a cease and desist order, and FERC agreed that plaintiff needed FERC's approval before proceeding with the mining. (*Id.*, Exhibit 5). This ruling by FERC presumably threw a monkey wrench into the project between plaintiff and CNGT, since it meant that they would have to go through the entire process of obtaining regulatory approval for an aspect of their project that they had believed did not require a permit. Moreover, after receiving this ruling, plaintiff did not immediately apply for a permit, but instead, it sought a hearing of FERC's determination. As a result, FERC considered CNGT's application to be incomplete. This objection by MHP is the only statement by a defendant that has been shown to have caused any delay in the FERC proceeding. However, plaintiff does not claim that MHP's statements regarding this jurisdictional issue were fraudulent. Instead, plaintiff ignores this objection and focuses its attack on other statements by the defendant which cannot be shown to have had any effect on the proceedings. Based upon all of the foregoing, the Court finds that the complaint fails to properly plead proximate causation.

CONCLUSION

Accordingly, for all of the foregoing reasons, defendants' motions to dismiss the complaint are granted. The complaint is dismissed, with prejudice.

SO ORDERED.

APPENDIX C

[Filed Nov. 17, 2000]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

ROSEANN B. MACKECHNIE
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the seventeenth day of November two thousand.

Dkt. No. 00-7302

BATH PETROLEUM STORAGE, INC.,
Plaintiff-Appellant,

v.

MARKET HUB PARTNERS, *et al.*,
Defendants-Appellees.

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Bath Petroleum Storage, Inc.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

ROSEANN B. MACKECHNIE, Clerk

By: /s/ Beth J. Meador
BETH J. MEADOR,
Administrative Attorney

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK
Rochester Division

[Filed Mar 31, 1998]

Civil Action No. 98-CV-6138CJS

BATH PETROLEUM STORAGE INC.
Plaintiff,

v.

MARKET HUB PARTNERS, L.P., MARKET HUB PARTNERS, INC., TPC CORPORATION
and
COALITION FOR RESOURCES AND ENVIRONMENT IN THE SOUTHERN TIER, INC.,
Defendants.

COMPLAINT

COMES NOW Plaintiff Bath Petroleum Storage Inc., and for its complaint respectfully represents as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331, 18 U.S.C. §§ 1964 and 1965, § 15 U.S.C. § 28 U.S.C. § 1337, and 28 U.S.C. § 1367(a).

2. Venue is properly laid in this judicial district pursuant to is U.S.C. § 1965 in that each Defendant transacts business, has an agent, or may be found in this district Also, Defendants reside in this Judicial district. Venue is also properly laid in this Judicial district pursuant to 28 U.S.C.

§ 1391(b) in that a substantial part of the events, actions or omissions giving rise to the claims herein occurred in this judicial district and a substantial part of the property that is the subject of this action is situated in this judicial district.

STATEMENT OF RELATED CASE

3. This case is not related to any other case now before this Court.

SUBJECT MATTER OF THIS ACTION

4. Defendants individually and collectively have violated the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.*, Section 349 of New York's General Business Law, have tortuously interfered with Plaintiff's contractual relations and have perpetrated common law fraud upon the Plaintiff. Plaintiff seeks monetary damages and injunctive relief. Further, Defendants MHP and TPC have violated the antitrust laws of the United States and New York including Section 2 of the Sherman Act, 15 U.S.C. § 2 and Section 340 of New York General Business Law.

5. This action arises out of a series of fraudulent and anticompetitive schemes perpetuated by the Defendants in interstate commerce in an attempt to monopolize the underground storage of high deliverability natural gas in the Northeastern United States and otherwise to destroy the underground salt cavern storage business being operated by the plaintiff Bath Petroleum Storage Inc. ("BPSI"). The schemes utilized include: (1) filing false affidavits and other documents with the Federal Energy Regulatory Commission ("FERC"), the New York State Department of Environmental Conservation ("NYDEC"), and the United Stases Environmental Protection Agency ("EPA"); (2) establishing sham non-profit organizations under New York law to mascarade as environmental advocates in an effort to destroy the BPSI salt cavern storage project as well as others

in the region; and (3) co-opting the NYDEC as a tool of the Defendants for the purposes of destroying BPSI's business.

6. As set forth below, TPC Corporation ("TPC"), Market Hub Partners, Inc. and Market Hub Partners, L.P. (hereinafter sometimes collectively referred to as "MHP"), Coalition for Resources and Environment in the Southern Tier, Inc. ("CREST"), and concerned Citizens of the Cohocton Valley, Inc. ("CCCV") are part of an associated in fact enterprise (the "Enterprise"), within the meaning of 18 U.S.C. § 1961(4). This Enterprise is engaged in interstate commerce or its activities affect interstate commerce. TPC, Market Hub Partners, Inc., Market Hub Partners, L.P., and CREST are the Defendants in this case. Each of them has conducted or participated, and continues to conduct or participate, directly or indirectly, in the conduct of such Enterprise's affairs through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c). Each of these Defendants, in violation of 18 U.S.C. § 1962(d), has also conspired to violate 18 U.S.C. §§ 1962(c), by agreeing to participate in the affairs of such Enterprise through the commission of or through aiding and abetting the commission of a pattern of racketeering activity involving numerous acts of mail and wire fraud in violation of 18 U.S.C. §§ 1341 and 1343, respectively. As a direct and proximate result of these illegal activities of Defendants, BPSI has been injured.

7. Defendants, individually and collectively, have violated Section 349 of New York's General Business Law by engaging in misleading acts or practices in an attempt to eliminate BPSI as a competitor and, thereby, have injured BPSI. In so doing, & Defendants have also injured New York's consumers of natural gas by depriving them of cost effective high deliverability natural gas storage services.

8. Defendants, individually and collectively, have violated Section 340 of New York's General Business Law by engaging in an attempt to monopolize the storage of high

deliverability natural gas in New York and elsewhere and thereby, have injured BPSI.

9. Defendants, individually and collectively, have also tortiously interfered with BPSI contractual relations and, so doing, have injured BPSI in its business and attempted to eliminate it as a competitor.

10. Finally, Defendants, individually and collectively, have intentionally, willfully and maliciously made materially false statements to various regulatory agencies causing these agencies to rely thereon to the detriment of BPSI, thus, directly and proximately causing it injury.

11. Plaintiff, BPSI, seeks damages for the injury it has suffered as a direct and intended result of the Defendants' illegal activities. These activities have prevented the timely issuance of federal and state approvals, permits, and certificates necessary for the operation of BPSI's underground salt cavern storage facility in Bath Township, Steuben County, New York ("Bath Storage Facility"). As a result, BPSI has lost the present ability to convert its facility to the storage of natural gas. Plaintiff also seeks injunctive relief to prevent Defendants from injuring BPSI further and destroying its existing business of operating a storage facility for liquid propane and butane gas ("LPG") at the Bath Storage Facility.

THE PARTIES

12. Plaintiff, BPSI, is a New York corporation having its principal place of business at 20 Crossways Park North, Suite 302, Woodbury, New York 11797. It owns and operates the Bath Storage Facility. Robert V.H. Weinberg is its President. BPSI is committed to protecting the environment of Steuben County, New York and its Bath Storage Facility is a clean, environmentally safe commercial operation. A declaration affirming many of the allegations in this complaint is attached hereto as Exhibit 1.

13. Defendant TPC is a wholly owned subsidiary of Pacificorp Holdings, Inc., which is a wholly owned subsidiary of Pacificorp. TPC is a Delaware corporation with its principal executive offices located at 200 WestLake Park Boulevard, Suite 1000, Houston, Texas 77079. Through its affiliate Market Hub Partners, L.P., TPC is the largest owner of natural gas salt cavern storage deliverability in the United States. TPC is an entity capable of holding a beneficial or legal interest in property, and, thus, is a "person" within the meaning of 18 U.S.C. § 1961(3).

14. Defendant Market Hub Partners, L.P., is a Delaware limited partnership with its principal place of business located at 44084 Riverside Parkway, Leesburg, Virginia. It was formed in December 1994 by TPC, and subsidiaries of NIPSCO Industries, Inc., New Jersey Resources Corp., DPL, Inc. (Dayton Power & Light), and Public Service Enterprise Group, Inc. Subsidiaries of TPC and these four companies are the limited partners of Market Hub Partners, L.P. and own the stock of Market Hub Partners, Inc., its general partner. TPC has a collective 66% voting and ownership interest in the Partnership and a revenue and expense interest which varies from approximately 61% to 70%. Market Hub Partners, L.P. is an entity capable of holding a beneficial or legal interest in property, and, thus, is a "person" within the meaning of 18 U.S.C. § 1961(3). Its existing salt cavern storage facilities provide approximately 1.65 Bcf/day of natural gas deliverability and approximately 12.5 Bcf/day of high deliverability working gas storage capacity. Through its wholly owned subsidiary, N.E. Hub Partners, L.P. ("N.E. Hub"), Market Hub Partners, L.P. is developing a salt cavern storage facility for the purpose of storing high deliverability natural gas in Tioga, Pennsylvania ("Tioga Project").

15. Defendant Market Hub Partners, Inc. is a Delaware Corporation and the general partner of Market Hub Partners, L.P. with its principal place of business located at 44084

Riverside Parkway, Leesburg, Virginia. TPC controls the Board of Directors and officers of Market Hub Partners, Inc. which operates as TPC's alter ego. Market Hub Partners, Inc. is an entity capable of holding a beneficial or legal interest in property and, thus, is a person within the meaning of 18 U.S.C. § 1961(3).

16. Defendant CREST is a non-profit New York corporation. CREST was incorporated on January 23, 1997 by Alan J. Knauf Esq. ("Knauf"). One of its stated purposes is to:

> provide a mechanism whereby concerned and interested citizens can help to preserve and protect the environment and natural resources in the Southern Tier of New York, including the Finger Lakes and Chemung and Cohocton Rivers, and contribute toward responsible land use and environmental planning in those areas.

Since its inception, CREST has been funded by MHP and/or TPC and used by them for the illegal and anticompetitive purposes set forth herein. Although funded primarily by MHP or TPC, CREST is an "entity separate" from them and is capable of holding a beneficial or legal interest in property, thus, is a person within the meaning of 18 U.S.C. § 1961(3).

NON-PARTIES INVOLVED

17. Thomas Siguaw ("Siguaw") is a high level manager with TPC. He is also MHP's Manager of Gas Storage. At all times relevant hereto, upon information and belief he supervised the operations of MHP and reported MHP's activities periodically to the officers of TPC. His offices are located within TPC's offices at 200 WestLake Park Boulevard, Suite 1000, Houston, Texas. Siguaw is a person within the meaning of 18 U.S.C. § 1961(3). Siguaw was and is the project manager for the Tioga Project. As project manager, he was responsible for retaining Acres International, Inc. ("Acres") and in particular Stewart

Thompson and Charles Roll to head the team tasked with destroying BPSI as a potential competitor for MHP's Tioga Project. On information and belief Siguaw, on behalf of TPC and MHP was instrumental in the establishment of CREST as well as CCCV and coordinated the anticompetitive activities as more fully set out herein.

18. CNG Transmission Corporation ("CNGT") is a Delaware corporation with its principal place of business in Clarksburg, West Virginia. CNGT is an interstate natural gas pipeline company providing natural gas transportation and storage services principally in the Northeastern and Mid-Atlantic regions of the United States.

19. Acres is a corporation organized under the laws of the State of New York and has its principal place of business in Amherst, N.Y. It operates as an engineering firm. Acres is an entity capable of holding a beneficial or legal interest in property, thus, is a person within the meaning of 18 U.S.C. § 1961(3). Acres has been retained by MHP to perform engineering services on its behalf with respect to its Tioga Project and also to prepare "expert" reports for MHP, and ostensibly for CREST, attacking the viability of BPSI's proposed expansion of its facility in Bath, New York, as more fully explained herein.

20. Thomas Magorian ("Magorian") is a geologist who resides in Amherst, N.Y. Magorian is one of the principal experts retained by MHP or it's affiliates to assist in developing its Tioga Project. Magorian was also retained by MET or TPC to assist in their unlawful actions to thwart BPSI's efforts to expand its salt storage facility in Bath, New York, as more fully explained herein.

21. R. W. Beck ("Beck") is a consulting engineering company with its principal place of business in Denver, Colorado. Beck was also hired by MHP to prepare a report

critiquing the BPSI project which has been used by MHP in its anticompetitive activities, as more fully explained herein.

22. NYDEC is an agency of the State of New York, with regional offices located throughout the state and headquartered in Albany, New York. The activities of NYDEC affect interstate commerce.

23. CCCV was incorporated on March 1, 1995, as a non-profit community based citizen's organization ostensibly to protect the environment around Avoca, New York, the site of another proposed salt cavern natural gas storage facility which would have competed with the Tioga Project. CCCV was formed and represented by the same attorney, Alan Knauf who incorporated and represents CREST. CCCV is a "member" of CREST, but is a separate corporation. Upon information and belief since its inception, CCCV has been funded by TPC or MHP and used by them for the illegal and anticompetitive purposes set forth herein. Although CCCV is funded primarily by TPC or MHP, CCCV is a corporate entity, separate from both of them. CCCV is an entity capable of holding a beneficial or legal interest in property, thus, is a person within the meaning of 18 U.S.C. § 1961(3).

COMMON ALLEGATIONS OF FACT

Background

24. Since at least 1995, Defendants and others acting in concert with them have conducted or participated, directly or indirectly, in a pattern of racketeering activity. That pattern relates to a series of nationwide schemes and artifices, and includes the predicate acts referred to below. Each of these schemes was designed to thwart or delay the attempts by others to establish salt cavern facilities for the storage of high deliverability natural gas in the Northeastern United States by means of the illegal and fraudulent activities more fully described below. Each of these activities was conducted in

the regular course of the Defendants' businesses and was consistent with Defendants' regular way of doing business.

25. The facts alleged herein are based on information now known to BPSI. BPSI believes there are additional facts to support its claims known only to Defendants, as a result of Defendants' concealment of their illegal and fraudulent schemes. These additional facts will be disclosed in discovery.

BPSI's Storage Facility

26. BPSI has operated its salt cavern storage facility at Bath, New York since 1983. The facility has been in existence since the early 1950s. It is a nonjurisdictional liquid hydrocarbon storage business using salt caverns.

27. BPSI stores LPG at its facility for its customers which are located primarily outside of New York. The gas is shipped to the facility by rail tank car or truck transport primarily from outside the State of New York and pumped into the caverns for storage. When the stored gas is delivered to a customer, it is transported to their location either by rail or truck

28. SALT caverns are created by drilling down from the surface of the earth through the bedrock and other geological formations until the salt layer is reached. The salt from which caverns are fashioned is between 300 and 500 feet thick and the top of the salt layer is between 2,900 and 3,100 feet below the surface at the Bath facility. Fresh water, not saturated with salt, is pumped into the salt layer and caverns are fashioned by the dissolution of the salt by the water. The brine (or water saturated with salt) created by this solutioning is pumped from the caverns and stored in brine ponds on the surface. Ultimately, BPSI disposes of the brine by making it available for transport from the facility for other commercial uses or by discharging regulated amounts into the Cohocton River

which is adjacent to the facility. The brine can also be disposed of in underground EPA (Class IID) injection wells.

29. Salt cavern storage offers significant advantages over conventional reservoir storage for pipelines and others engaged in the transportation of natural gas. Natural gas, which is injected under pressure, is generally not subject to loss because salt caverns are generally located approximately one-half mile below the surface.

30. Salt dome storage facilities, such as the facility being developed by Defendants MHP and TPC at Tioga, Pennsylvania, have salt roofs. Salt roofs are necessary in such facilities because faulting has made the overlying rock formations susceptible to the leakage of stored hydrocarbons. In contrast, BPSI's facility is located in a stratified salt formation which, while being thinner than domal salt, has the advantage of having an impermeable roof consisting of bedrock Salt roofs are neither feasible, desirable, nor necessary for stratified salt caverns.

31. During 1995, MHP sought to purchase BPSI's facility, however, the parties never reached agreement. MHP recognized that the BPSI facility had value because: (1) it would be more cost effective to convert existing caverns to the storage of natural gas rather than drill new wells and solution new caverns; (2) by purchasing an existing facility, some delays associated with environmental review could be potentially avoided and (3) BPSI's facility is in a fault free location that is particularly well-suited to store natural gas.

32. On February 26, 1996, BPSI entered into a lease agreement with CNGT to lease part of the BPSI facility to CNGT ("Lease Agreement"). BPSI agreed to provide CNGT with natural gas storage capacity from the older existing caverns by late 1997 and from new caverns under construction by 1999. Additionally, pursuant to an Operation and Maintenance Agreement between BPSI and CNGT of

even date, BPSI agreed to manage the natural gas storage component of its facility for CNGT.

33. BPSI's LPG facility is not regulated by the FERC under the Natural Gas Act, 15 U.S.C. § 717 *et seq.* If converted to natural gas storage, the operation of that portion of BPSI's facility for the storage of natural gas being transported in interstate commerce by CNGT would be so regulated by FERC.

34. As part of the Lease Agreement between BPSI and CNGT, regulatory permits were to be obtained through various federal and New York State agencies for conversion of the operation from the storage of LPG to the storage of natural gas. These permits would also be used to operate the facility after conversion. CNGT was required, pursuant to the lease agreement, to obtain a certificate of public convenience and necessity from FERC; BPSI and CNGT were to obtain permits from the EPA and NYDEC. On May 6, 1996, CNGT filed with FERC an application requesting the necessary certificate authority.

35. If BPSI's Bath Storage Facility had been converted to natural gas storage, BPSI would have become TPC and MHP's first competitor for the storage of high deliverability natural gas in the Northeastern United States.

TPC

36. TPC, formerly Tejas Power Corporation, owns salt storage projects throughout the United States through its affiliate MHP.

37. Although major decisions such as acquisitions, divestitures, and approval of the operating budget require the vote of more than one limited partner, TPC effectively controls the operations of MHP.

38. TPC also provides loans to MHP. Substantial cash advances have been made to MHP by TPC to fund

construction and development activities for its gas storage projects. For example, during 1995 and the first quarter of 1996 cumulative advances were over $30 million.

39. TPC operates its natural gas storage business through MHP. In exchange TPC renders administrative, financial and similar services for MHP.

40. Since July 1, 1996, MHP has occupied office space in Houston, Texas, leased by a TPC subsidiary from a third party. MHP reimburses the TPC subsidiary for this space at the subsidiary's cost; however, the TPC subsidiary remains primarily liable on the lease with the third party.

41. On July 31, 1996, TPC employees who previously had been involved in providing project development services, construction management services, storage sales services and gas title information and administrative services for MHP were transferred to MHP. The services contracts between MHP and TPC for these services were canceled when the TPC employees rendering these services became employees of MHP. The remaining service contracts between TPC and MHP for accounting; financial, field operating, and technology access services remain in force. TPC performs all or virtually all of the day-to-day jobs involved in running MHP either through service contacts or transferred employees.

42. In all significant respects, MHP is operated by TPC. Upon information and belief, through Siguaw, TPC manages the day-to-day operations of MHP.

TPC's Tioga Project

43. In August 1993, TPC, then Tejas Power Corporation, and Gaz de France announced an agreement to collaborate in the development of a gas storage facility in the Northeastern United States along CNGT's system.

44. CNGT was exploring a possible joint venture with TPC to develop a salt cavern storage facility when MHP first began developing the Tioga project. CNGT withdrew from the joint venture discussions prior to the time that it entered into the Lease Agreement with BPSI.

45. On November 7, 1995, MHP through its wholly owned subsidiary, N.E. Hub, applied to FERC for a certificate authorizing the construction and operation of a salt cavern storage facility at Tioga, Pennsylvania (Docket No. CP 96-53-000). The Tioga Project, located approximately 50 miles southeast of the Bath Storage Facility has also been designated for development as a high deliverability natural gas storage facility. MHP has not yet finally obtained all of the appropriate regulatory permits so that it can operate its Tioga Project, although the process is substantially complete. Once MHP obtains final regulatory approval, it will operate the only such facility in interstate commerce in the Northeastern United States.

46. Acres is the principal engineering firm retained by MHP and/or its affiliates to provide expert engineering services as a part of MHP's efforts to obtain regulatory approval to develop the Tioga Project.

Formation of the Enterprise

47. On information and belief in early 1995, MHP funded a newly created corporation that from all outward appearances was an environmental group, CCCV. While ostensibly a community based citizen's group created to protect the environmental amenities of the Cohocton Valley, CCCV was really a stalking horse for TPC and MHP.

48. TPC, Market Hub Partners, L.P., Market Hub Partners, Inc. and CCCV became associated in fact for the purpose of promoting the MHP owned Tioga Project and destroying potentially competing salt cavern storage projects

in the Northeastern United States. Effective January 23, 1997, CREST was incorporated. Within two weeks, if not immediately, CREST became part of the associated in fact Enterprise.

49. By February 6, 1997, the Enterprise consisted of TPC, MHP, CCCV, and CREST, who were and are associated in fact. This Enterprise has an existence apart from its members.

50. The Enterprise is associated for a common purpose: that is, to obtain all needed licenses and permits for the Tioga Project and delay or thwart potential competitors from obtaining necessary permits, certificates, and other authorizations, so that competing salt cavern storage facilities are not constructed and placed in operation.

51. The activities of the Enterprise affect interstate commerce, *i.e.* the movement and sale of natural gas and BPSI's existing business of the storage of LPG sold in interstate commerce. The Enterprise is also engaged in interstate commerce.

Conduct of Enterprise's Affairs

52. In MHP's opposition to the proposed Avoca Natural Gas Storage Facility, as described herein, the *modus operandi* emerged that would be followed by the Enterprise in opposing BPSI and any other projects in the future that pose a threat of competition to MHP. MHP would fund an environmental group, which would then file fraudulent and misleading statements concerning the would be competitor with state and federal regulatory agencies. As it considered appropriate, MHP itself with help from the engineers and engineering firms it retained would also file pleadings with regulatory agencies attacking would be competitors with false, misleading and fraudulent statements. These efforts would be undertaken to delay or prevent other entities from

entering the high deliverability natural gas salt storage industry.

53. In operation, the Enterprise is funded by TPC which also provides its policy direction, which is implemented by Siguaw. MHP provides the specific disinformation that needs to be disseminated concerning a particular project. The Enterprise has at its disposal Acres, Magorian, and Beck, who can develop documents and submissions which have a veneer of respectability and which, without close scrutiny, appear to be based on sound engineering principles. Acres, Beck, and Magorian all lend their engineering credentials to this effort to enhance the plausibility of the fraudulent submissions. They are also involved in legitimate engineering work for the Tioga Project. CCCV, and later CREST, in some of the documents and submissions filed with FERC, or other agencies, postured themselves as groups of citizens with environmental concerns. As herein described, MHP also filed fraudulent and misleading documents in its own right CREST and CCCV are able to provide lower level management skills in assisting the Enterprise in conducting its affairs so that the relationship between CREST, CCCV and the Tioga Project is not apparent to regulatory agencies and others.

54. TPC, MHP and CREST each participates, and has participated, directly or indirectly, in the conduct of the Enterprise's affairs through a pattern of racketeering. As set forth below, each Defendant has committed numerous acts of mail and wire fraud, in violation of 18 U.S.C. §§ 1341 and 1343, respectively.

55. The mails and interstate telephone service were used for the purpose of executing the fraudulent scheme or were incidental to that scheme. Some or all of the fraudulent statements themselves were deposited in the United States mails and sent to state and federal regulatory agencies. Additionally, other documents were deposited in the mails in furtherance of the scheme, *e.g.* memoranda, copies of

documents that had been filed with agencies, bills, etc. Moreover, there were interstate telephone calls and facsimiles and perhaps even modem to modem connections in furtherance of the fraudulent scheme. MHP has offices in Houston, Texas and in Leesburg, Virginia. TPC has offices in Houston, Texas. CREST has its principal office in Rochester, New York. CCCV's principal office is in Avoca, New York. Acres and Magorian are in Amherst, New York. Beck is in Denver, Colorado. The NYDEC is in Albany and Avon, New York. FERC and the EPA are located in Washington, D.C. EPA Region 2 is located in New York, New York.

56. Each Defendant either caused the mails to be so used, or acted with knowledge that such use of the mails would follow in the ordinary course of business. In the case of all Defendants, such use of the mails reasonably could be foreseen.

57. Each Defendant either caused such interstate telephone wire communications to be used, or acted with knowledge that such use of interstate telephone wire communications would follow in the ordinary course of business. In the case of all Defendants, use of such interstate telephone wire communications reasonably could be foreseen.

58. Each of the Defendants also conspired to conduct the affairs of the Enterprise through a pattern of racketeering, consisting of wire and mail fraud.

The Avoca Project

59. On November 19, 1993, Avoca Natural Gas Storage executed a major precedent agreement for services with Orange & Rockland Utilities ("O&R"), located in Rockland County New York. O&R would purchase 55 Mcf/day of firm storage deliverability natural gas commencing in the 1995-

1996 winter heating season. In entering into the agreement with Avoca, O&R hoped to lower their customers' costs and more effectively meet their customers' needs.

60. In December 1993, Avoca Natural Gas Storage filed an application with FERC for a certificate to develop, construct, and operate an underground gas storage field ("Avoca Project") in Avoca, Steuben County, New York. On September 20, 1994, FERC issued a certificate of public convenience and necessity for the Avoca Project.

61. On April 17, 1996 MHP sought leave to intervene in the Avoca Natural Gas Storage proceeding pending before FERC. Again in March 1997 MHP filed materially misleading comments with FERC in that proceeding.

62. CCCV moved to intervene in the Avoca Natural Gas Storage proceeding pending before FERC on February 5, 1995, some three weeks before it was officially incorporated.

63. Upon information and belief, CCCV was formed and its expenses paid by MHP or its affiliates in an effort to block the Avoca Project and deflect attention from MHP's anticompetitive practices.

64. CCCV participated actively in the Avoca proceedings at FERC and later brought law suits in state and federal court to delay and, through delay, to prevent the Avoca Project from going forward. There is no indication that CCCV has ever participated before FERC or elsewhere in any other proceeding involving any project other than Avoca or BPSI. There is no record in the Federal Register of CCCV ever having filed comments in any rulemaking proceeding by any federal agency. Further, CCCV, although it has solicited and received such donations, has never registered with the State of New York as a non-profit corporation seeking public donations and has never sought tax exempt status from the Internal Revenue Service pursuant to §501(c) of the Internal Revenue Code.

65. On April 9, 1997, CCCV, through Knauf, filed critical comments in the Avoca Natural Gas Storage docket proceeding before FERC objecting to the proposal. In part CCCV alleged as follows:

> a. The pipeline [for brine disposal] has been deliberately routed within a few hundred feet of the Bath Petroleum Storage Inc. site (the "Bath facility"), which CNG Transmission Corp. ("CNG[T]") is presently seeking to convert to a major natural gas storage facility (FERC Docket No.: CP96-492-000) (the "Bath project").
>
> b. There can be no doubt that the Avoca and Bath projects are linked, since CNG[T] already proposed that the two facilities share natural gas transmission lines.
>
> c. Further, it is extremely likely that the Bath project will also use the Pipeline for disposal of waste brine generated from the solutioning of additional caverns at the Bath Facility.
>
> d. The existing method for disposal of brine at the Bath Facility—discharge into the Cohocton River—is not allowed under the facility's existing State Pollution Discharge Elimination System ("SPDES") permit issued by the New York State Department of Environmental Conservation ("DEC"). Further, in light of the severe environmental damage that has already occurred, including damage to crops using the river for irrigation, damage to fish, and temporary shut downs of the Chemung River as a water source for the Elmira Water Board, it is unlikely that such discharges would be permitted in the future.
>
> e. Therefore the Bath Project needs a new method to dispose of its brine waste, and the Pipeline, will runs [sic] across the street on which the Bath Facility is located, is the obvious candidate of CNG[T]. [sic]

f. The necessity of such an alternate disposal method is highlighted by an administrative enforcement action brought by DEC on March 14, 1997 (DEC Case No.: R8-1088-97-01). In that proceeding, DEC is seeking millions of dollars of fines for violations of the Clean Water Act on hundreds of occasions since 1992 due to discharge of brine from the Bath Facility into the Cohocton River in violation of its SPDES permit, and has ordered a halt to solutioning activities.

g. Thus, pursuant to the National Environmental Policy Act, the cumulative impact of development of the Avoca and Bath Projects must be assessed, and the review cannot be limited to separate site-specific analyses.

Comments on Environmental Issues filed April 9, 1997.

66. Of these allegations only a few were true: (1) CNGT intended to use the Bath facility for the storage of natural gas; and (2) an administrative proceeding against BPSI is pending before the NYDEC. The remaining statements were misleading and fraudulent.

67. CCCV also falsely alleged that there had been inadequate testing to assure that no leakage will occur from brine disposal or to assure that the strength and integrity of strata within the aquifer will not be compromised.

68. CCCV and Knauf knew these statements were false or exhibited a reckless disregard for the truth in making them. MHP and TPC either knew these statements were false or in directing that CCCV make them, exhibited a reckless disregard for their truth. The United States mail was used in furtherance of the scheme to defraud. The comments referred to above were deposited in the mail. MHP and TPC either caused them to be mailed or acted with knowledge that the use of the mails would follow in the ordinary course of

business. In the case of MHP and TPC, such use of the mail also reasonably could be foreseen.

69. CCCV also noted in its filing that it had participated in two cases involving the Avoca project, *Concerned Citizens of the Cohocton Valley, Inc. v. Town of Avoca Planning Board*, 919 F. Supp. 643 (W.D.N.Y. 1996), aff'd in part, dism'd in part, 127 F.3d 201 (2d Cir. 1997) and *Concerned Citizens of Cohocton Valley, Inc. Petitioner, v. Zagata*, Index No. 1823-96 in the New York Supreme Court, in which CCCV sought to enjoin all work on the Avoca project. In the FERC proceeding, CCCV sought a full environmental review of the Avoca and Bath projects.

70. On information and belief, CCCV was being funded by MHP, which provided CCCV with a motive to commit fraud to support the Tioga application by delaying perceived competitors of MHP. CCCV had the opportunity to commit the fraud inasmuch as its representation that it was an environmental group provided it with added stature in the eyes of FERC.

71. CCCV's and MHP's efforts have succeeded; Avoca abandoned its project in May 1997 and filed for bankruptcy protection in July 1997.

CNGT Seeks Authority To Use The BPSI Facility To Store Natural Gas

72. In May 1996 CNGT applied for the required FERC certificate to use the Bath Storage Facility for natural gas storage. Almost immediately, MHP launched an attack on this process by filing protests and objections to the CNGT certificate application with FERC. MHP made filings on August 15 and December 26, 1996. The primary thrust of these objections was focused on the geological conditions present at the Bath Storage Facility and its appropriateness for the storage of natural gas. MHP also alleged that the BPSI facility was unsafe and constituted an environmental hazard.

In particular, MHP, supported by affidavits prepared by its agents, Magorian and Acres, hired for the purpose of discrediting the CNGT application and the fitness of the BPSI site, complained that:

a. A geological fault exists at the Bath Storage Facility that potentially would affect both CNGTs plan to convert gas storage caverns and its waste brine disposal strategy;

b. BPSI's cavern design and construction practices deviate materially from established guidelines promulgated by a subcommittee of The Interstate Oil and Gas Compact Commission ("IOGCC") (an organization dominated by TPC and whose operatives drafted the guidelines to favor TPC's competitive position in the industry);

c. There is evidence of the existence of structural failures at the BPSI site;

d. The existing caverns at the BPSI site are structurally and mechanically unstable for high pressure natural gas storage and, given the potential for migration and release of explosive product from the wells across and possibly off site including into the Cohocton River, the potential for devastating environmental impacts is high;

e. There is a high potential for full scale collapses of the underground salt cavern storage facilities which would jeopardize the health and safety of area residents;

f. BPSI has a history of releasing high concentration of chlorides into the Cohocton River in violation of its State Pollution Discharge Elimination System ("SPDES") permit which resulted in crop damage in downstream areas and will continue to result in

significant potential for the degradation of downstream aquatic environments; and

g. BPSI cannot maintain pressure at levels required to use the caverns for the storage of natural gas.

73. All of these statements are false and misleading. In truth and in fact:

a. Extensive geological studies undertaken by BPSI demonstrate that there is no geological fault as postulated by MHP's experts. (See Exhibits 2 and 3 attached hereto).

b. The design of the BPSI caverns is actually superior to the MHP-Tioga cavern design because the domal salt located at Tioga is as a result of faulting, whereas no faulting exists at the BPSI site.

c. There is no evidence of structural failures at BPSI's facility and BPSI has conducted extensive structural integrity and pressure tests which prove the structural stability of the BPSI caverns.

d. Based upon the previously cited testing, there is very little possibility of the catastrophic consequences postulated by MHP and its operatives.

e. BPSI has fully complied with the sampling and monitoring requirements of its SPDES permit and damage to crops, if any, has never been shown to be a result of discharges made by BPSI.

f. Pressure tests conducted by BPSI prove that its caverns can withstand pressures far in excess of that necessary to store natural gas.

74. Those making the statements on behalf of MHP either knew them to be false or made them with a reckless disregard for the truth. Additionally, MHP and TPC either knew them to be false or caused them to be made with a reckless disregard for the truth.

75. Defendants had a clear motive for making these false and misleading statements in order to delay or thwart action on FERC approvals needed in order for CNGT to use BPSI's facilities for natural gas storage.

76. The opportunity for misleading FERC is manifest. In conducting the affairs of the Enterprise, Defendants MHP and TPC ensured that the false, misleading and fraudulent statements that were made bore the imprimatur of an otherwise reputable engineer or engineering firm. In other cases, they had comments filed by one of the sham environmental groups they had created and funded, CCCV or CREST.

77. The strong possibility that there was a serious and potentially dangerous geological fault running through the BPSI property was postulated by Magorian, MHP's retained geologist. Magorian's theory was based, almost solely, upon his alleged interpretation of a 1984 seismic study prepared by Grant Geophysical at a location near the BPSI facility and a seismic map prepared by Arthur Van Tyne.

78. Magorian's conclusions, based upon his interpretation of the seismic data, are false and misleading and were made at the direction of MHP and TPC. They were either known by Magorian, MHP and TPC to be false and misleading or made with a reckless disregard for the truth. (See Exhibit 4, Affidavit of Arthur Van Tyne).

79. No fault as claimed by Magorian, exists at the BPSI facility. As Dr. Robert D. Jacobi, Associate Professor of Geology, State University of New York at Buffalo, states in his attached affidavit, none of the reliable data suggests the presence of a fault as stated by Magorian. Indeed, Dr. Jacobi found Magorian's statement "difficult to reconcile with either the publications to which he refers, or with the seismic line he discusses." Jacobi's studies confirm, on the other hand, "that no evidence exists from which a geological fault could be

inferred. . ." (See Exhibit 2). This is corroborated by the results of a Soil Gas study conducted by Jacobi's colleague, Dr. John Fountain (See Exhibit 3).

80. Magorian was acting at the direction of MHP and TPC.

81. CREST and NYDEC also intervened as parties in the FERC proceeding and opposed the granting of a FERC certificate to CNGT.

82. In addition to Magorian, MHP engaged Acres to conduct a number of additional studies regarding the BPSI facility and furnished affidavits prepared by Acres personnel to FERC in support of MHP's objections to the Bath Project.

83. Magorian and Acres are the principal experts hired by MHP to produce geological reports supportive of NE Hub's regulatory applications for the Tioga Project. Substantially all of the information provided by MHP and its paid operatives to FERC in regard to the CNGT application was false and was known to be false at the time the representations were made and the opinions were rendered. Moreover, the submissions to FERC were made with the purpose of preventing a competitive entity from gaining access to the natural gas storage market by: (1) delaying BPSI's permit approval process for such a substantial period of time that MHP could obtain approval of the Tioga Project prior to BPSI obtaining the required permits; (2) increasing BPSI's transactional costs so significantly that it would ultimately abandon its efforts to become a natural gas storage facility; and, (3) causing sufficient delays so that CNGT would find the use of the BPSI facility as a natural gas storage facility to be unattractive, thus causing CNGT to terminate the Lease Agreement with BPSI.

84. In order to gather information and disseminate these falsehoods, MHP, TPC, CREST and their affiliates and agents, caused the United States mail and interstate telephone lines to be used.

85. MHP's effort was met with initial success when CNGT filed on April 18, 1997, an amendment to its year-old application for the Seasonal Service Expansion Project, and sought phased consideration of the project out of concern that all of the authorizations requested would not be granted in time for the 1997-1998 winter heating season. Under the amendment consideration of the BPSI proposal was to be deferred. Thus, it was clear that MHP and the other Defendants had been successful in delaying consideration by FERC of the use by CNGT of the Bath Storage Facility for the storage of natural gas.

86. In November 1997 CNGT informed BPSI that as a direct result of MHP's and CREST's actions to thwart regulatory approval, it had determined to terminate the Lease Agreement with BPSI, which was finally accomplished in January 1998.

87. In a letter order issued January 28, 1998, FERC dismissed the application by CNGT for authority to convert the BPSI facility to one for natural gas storage because CNGT had not responded in a timely fashion to FERC inquiries. CNGT's failure to respond was based upon its determination to withdraw from the Lease Agreement.

88. CNGT announced the next day that it was canceling the project. Use of the converted facilities would have marked CNGT's debut as a provider of high deliverability storage services in the area. CNGT officials said that Defendants' objections to the BPSI project was slowing FERC's approval of the overall expansion.

89. As a direct consequence of CNGT's cancellation of the lease agreement with BPSI, BPSI has suffered millions of dollars in damages as hereinafter more fully described.

NYDEC Proceedings

90. On November 5, 1996, NYDEC issued a staff initiated modification of BPSI's existing SPDES permit. That modification, *inter alia*, imposed a "mass balance" formula

for calculating the in stream concentration levels of chlorides and total dissolved solids of BPSI's discharges into the Cohocton River.

91. BPSI objected to the permit modification proposed by NYDEC. Upon information and belief MHP, through its affiliates and agents, induced NYDEC to require BPSI to utilize this "mass balance" formula to measure levels of chloride and total dissolved solids in the Cohocton River. This formula, which has not been utilized before by NYDEC to measure compliance with water pollution standards, requires BPSI to collect samples of river water from the Cohocton River at a point upstream of its facility, have the effluent levels determined by a state certified laboratory and then calculate the volume of discharge which is permissible. Given the inherent delay (2-5 days) for receipt of the laboratory results, the use of this formula and methodology specified by NYDEC makes it impossible for BPSI to discharge brine into the Cohocton river without subjecting itself to enforcement action by NYDEC for violations of its SPDES permit because of the inability to obtain the test results at the time of discharge.

92. On February 6, 1997, two weeks after its formation, Knauf, on behalf of CREST, filed a "Petition for Party Status and SPDES Permit Modification/Suspension" with NYDEC seeking to intervene in BPSI's SPDES permit proceeding. In that application CREST held itself out as a community public interest group and failed to disclose that, in fact, it was formed and organized for the express purposes of concealing MHP's interest. Upon information and belief, CREST was formed by MHP for the sole purpose of thwarting BPSI in its attempt to secure modifications of its existing permits and to prevent BPSI from obtaining new federal and state permits, all of which are necessary to further the conversion of its salt storage caverns to natural gas storage. CREST has few, if any, citizen members.

93. Attached to its petition, CREST submitted numerous affidavits and reports prepared by Acres. The CREST petition asserted that:

a. BPSI was guilty of having violated the terms of its existing SPDES permit by discharging huge quantities of brine into the Cohocton River;

b. These discharges have caused a significant negative impact on the fish population downstream in the Cohocton River;

c. The BPSI proposal would likely result in harm to the habitat of the timber rattlesnake, an endangered species;

d. As a consequence, a more thorough environmental impact study should be required;

e. The planned conversion to natural gas would create an increased threat of catastrophic explosion;

f. As a result of years of uncontrolled solutioning, BPSI's storage cavern facility has become dangerously unstable. The original six caverns have been allowed to grow irregularly, apparently extending their lateral reach across the site, jeopardizing the integrity of the present storage complex and surrounding area. Subsurface subsidence may continue to erode caverns upward into water bearing zones feeding and accelerating vertical growth of "stokes" under uncontrolled solutioning conditions;

g. The environmentally unsafe use of the caverns could result in the release of explosive product into the prolific fresh water aquifers of the Cohocton River underlying the facility;

h. Subsurface subsidence could result in full scale collapses of the underground salt cavern storage facilities resulting in uncontrolled release of the gas product;

i. Substantial geological faulting exists on the site creating an environmental hazard;

j. During the period of 1994 to 1996, BPSI substantially exceeded the level of effluents permitted in its discharge into the Cohocton River under its SPDES permit. This has resulted in poor plant growth downstream; and

k. The design of the underground injection wells for brine disposal is scientifically flawed given the volume of brine which would be required to be discharged each day.

94. These statements were fraudulent, false, and misleading. In truth and in fact:

a. BPSI explicitly followed the effluent limitations and monitoring requirements set forth in its SPDES permit Further, NYDEC changed the criteria for measurement of discharges into the river and applied a new standard not found in BPSI's SPDES permit.

b. CREST has provided no evidence of any damage to fish in the Cohocton River. Rather, studies commissioned by BPSI prove that there has been no damage and, in fact, the only deterioration in river quality has been the result of other point sources.

c. Studies and surveys have yet to reveal the existence of the timber rattlesnake at the property in question.

d. Adequate and complete environmental studies were conducted and there is no rational basis for requiring additional tests or studies.

e. The planned conversion to natural gas would not in any manner create an increased threat of catastrophic explosion and in fact natural gas is safer to handle than LPG (although both are safe if handled properly).

f. There is no evidence of uncontrolled solutioning of caverns which would permit the migration of gases. In fact, all studies conducted demonstrate the continued integrity of the individual caverns which have not expanded to any significant degree in the entire time the facility has been utilized. (See attached affidavits of Dr. Robert Jacobi and Dr. John Fountain, Exhibits 2 and 3).

g. There is no rational basis for contending that BPSI caverns pose any danger to fresh water aquifers which are located approximately one-half mile above the storage caverns. Moreover, LPG and natural gas are not even considered potential pollutants to water by the EPA and not included on its lists of pollutants.

h. Testing unequivocally demonstrates that significant surface subsidence at this location is a practical impossibility.

i. There is no evidence of geological faulting at the BPSI location as indicated in the attached affidavits.

j. BPSI has fully complied with the sampling and monitoring requirements of its SPDES permit and damage to plant life, if any, cannot be shown to be a result of BPSI's discharges into the Cohocton River.

k. Tests show that the successful use of an underground injection well is feasible at this location. Even were it not, the only risks involved with the use of such a well are economic not environmental.

95. MHP paid for the affidavits and studies prepared by Acres personnel and their other activities in support of CREST's objections to the BPSI modification. These affidavits and studies, costing thousands of dollars, are generally speculative, unscientific, not based upon reliable data and largely untruthful and were known by their authors to be false or misleading at the time the representations were made and the opinions were rendered. MHP, CREST and

TPC either knew them to be false or made them with a reckless disregard for the truth. Moreover, the submissions to NYDEC were made with the sole purpose of preventing or delaying BPSI from gaining access to the high deliverability natural gas storage market.

96. CREST is primarily funded by MHP or its affiliates. Further, based on information and belief MHP or its affiliates have paid CREST's legal fees in connection with its efforts to prevent BPSI from obtaining modifications of its New York State and EPA permits. CREST does not appear to have engaged in any other activities which are not directly related to opposing BPSI's permit applications.

97. On February 13, 1997, on behalf of CREST, Knauf and Acres representatives appeared at a public hearing involving the NYDEC initiated SPDES modification before an Administrative Law Judge ("ALJ') to oppose the modification of BPSI's permit. The depth of Knauf's knowledge at this hearing suggested significant preparation and background in technical terms which could not have been acquired without the assistance of Acres personnel who were actively working to discredit the BPSI efforts on behalf of MHP.

98. In March 1997 the ALJ granted CREST party status in the modification proceeding under the mistaken belief that CREST was actually a public interest group. Upon information and belief one of the primary reasons MHP formed CREST was to achieve party status in the various regulatory proceedings. It is unlikely MHP, as a competitor, would have been granted party status in the administrative proceeding.

99. During January 13-15 and March 12-13 1998, CREST participated as a party in a hearing before an ALJ related to the SPDES permit modification.

100. At the January hearing, CREST presented testimony from Cameron Lange and Rex Tolman, both of Acres. Tolman testified that he had performed substantial work for MHP on the Tioga Project and until one week prior to the hearing on the SPDES modification had been billing his time to a MPH project number. He had only been furnished a CREST billing number after BPSI sought discovery relating to the billing practices of Acres on this project, which request was rebuffed by the ALJ upon the motions of CREST and MHP. As additional evidence of MPH's control exercised over Acres work on behalf of CREST, when BPSI sought this information related to the preparation of Acres' work product on behalf of CREST, MHP through its attorneys, sought to block the discovery on the basis that it was violative of MHP's attorney-client and work product privileges.

101. NYDEC staff has relied on the factual representations made by CREST and embarked on a proceeding that threatens BPSI's existing LPG storage business.

102. At the SPDES modification hearing on January 15, 1998, Tolman testified that oil and grease may be contained in brine developed from cavern solutioning and, thus, contained in BPSI's discharges into the Cohocton River. Yet he had no reasonable, justifiable basis for the statement.

103. In truth and in fact there is no measurable oil or grease contained in the brine created from cavern solutioning. This fraudulent, false, and misleading statement was known by Tolman to be false when he made, or at least made with a reckless disregard for the truth. TPC, MPH, and CREST also knew it to be false when made, or at least, that it was made with a reckless disregard for the truth.

104. NYDEC has relied on the false, fraudulent, and misleading statements and representations of MHP and as a result final action on the BPSI permit has been delayed. Further, as a result of these false, fraudulent, and misleading

statements and representations, NYDEC has importuned FERC and EPA to delay their actions on the BPSI permit and certificate authority, respectively. One of the methods used by MHP to secure the cooperation of NYDEC is in presenting CREST as a legitimate environmental consumer organization with real concerns about the environment in Steuben County, New York. CREST has, in turn, portrayed BPSI as an "environmental bad actor", "major environmental scofflaw" and as a "rogue operation that continually and intentionally violates applicable environmental laws".

105. Additionally, MHP has directly provided NYDEC information and various inappropriate methodologies which NYDEC has accepted and utilized to substantially impede the permitting process. This information has been provided to NYDEC on an informal basis and has been utilized by NYDEC without disclosure to BPSI that information considered critical to NYDEC had been submitted by a competitor outside the normal regulatory process.

106. For example, sometime in the summer of 1996 NYDEC furnished documents relating to the abandonment of Cavern No. 2 to H.J. "Buster" Heneman, Manager for Business Development of TPC. This well was not part of the application submitted to FERC to be converted to the storage of natural gas. Nor was the abandonment of the well of any interest to TPC. Nevertheless, Heneman wrote a memorandum to Sandy Brennan, then Director of the Bureau of Oil and Gas at the Division of Minerals at NYDEC commenting on BPSI's things with NYDEC in that regard. The memorandum, which is attached hereto as Exhibit 5, exhibits a private close working relationship between Brennan and Heneman one which is highly inappropriate. Moreover, that the comments, were subsequently adopted by NYDEC, demonstrates that NYDEC was participating actively as part of the Enterprise seeking to destroy BPSI's business. That NYDEC circulated the comments and

provided a copy to the head of the Region 8, Minerals Division gives credence to this conclusion. Notably this document was treated as "confidential" by NYDEC for FOIL purposes and was only provided to BPSI after several appeals of NYDEC's decision to withhold documents from production pursuant to BPSI's FOIL requests. As produced, it is in redacted form and NYDEC professes to have no complete copy.

107. NYDEC has also provided internal documents directly to CREST and its affiliates, by facsimile and otherwise on a periodic basis without requiring the recipients to file a formal written request. Yet when BPSI has sought documents related to MHP's submissions to NYDEC concerning the BPSI project, it has been met with intentional efforts by NYDEC staff, including its attorneys, to hinder its efforts to obtain such information. In fact, on January 29, 1998, Lisa Perla Schwartz, NYDEC's attorney, produced two typewritten lists totaling 91 pages which lists more than 350 categories of documents totaling over 3000 pages withheld from BPSI pursuant to its various FOIL requests directed to the Department, including general documents from MHP for which there is no statutory basis for withholding their production. She has subsequently revealed that, not only are those lists incomplete, she is preparing an additional list which reportedly contains in excess of one thousand categories of documents withheld from production.

108. Additionally, NYDEC has sought to impose numerous other burdensome requirements suggested by MHP upon BPSI which it has not imposed upon other entities engaged in solution mining or underground storage.

109. In March 1997, using the "mass balance" formula introduced by CREST and MHP, and not contained in BPSI's SPDES permit, NYDEC filed an enforcement action against BPSI seeking $14.5 million in fines and other penalties and issued press releases damaging to BPSI. MHP and CREST

recommended that this formula be imposed on BPSI, not because of any environmental concerns, but rather in an effort to destroy BPSI's business and eliminate BPSI as a competitor of MHP. In return, NYDEC instituted the enforcement action despite the knowledge of its personnel that BPSI had accurately monitored discharges in accordance with the requirements of its SPDES permit. Thomas Pearson, Regional Water Engineer for NYDEC Region 8, admitted fact in sworn testimony on January 14, 1998, at the SPDES modification hearing. Further, even though the action was initiated by NYDEC more than one year ago, no effort has been made to even assign an ALJ to hear the enforcement complaint.

110. On December 6, 1996, BPSI applied to NYDEC for permission to modify its underground salt cavern storage permit. The purpose of this application for modification was to increase the capacity of the BPSI facility for the underground storage of LPG and natural gas.

111. NYDEC refuses to act upon BPSI's application for a permit to expand its facility through the drilling and development of additional wells in the absence of BPSI providing sonar soundings for each existing well. Sonar soundings are not required under existing regulations; nor have they been required in the past by NYDEC as a condition precedent to consideration of a pennit application. Moreover, the cost of preparing and conducting each sonar sounding would be approximately $100,000.00 per cavern (BPSI has 7 existing operating storage caverns and has drilled 5 wells which have not yet been solutioned to create caverns) which makes it prohibitively expensive and oppressive as a requirement for department action because it is necessary to remove and replace the tubing in the wells at least twice (once to conduct sonars and again to convert to natural gas storage).

112. As with the SPDES enforcement action, the genesis of the sonar requirement can be traced to MHP. A "draft" report dated December 12, 1996, prepared by Beck for TPC and addressed to its president, attacks the BPSI proposal and recommends that NYDEC require sonar soundings for each well as part of the review process. This draft report appears in NYDEC's files as a result of an unsolicited submission by MHP or its affiliates. The report is flawed and is based upon unscientific methodology and unsubstantiated assumptions. Nevertheless, MHP has succeeded in causing NYDEC to use this unverified report as the basis for administrative action taken against BPSI. The "final" report dated February 4, 1997, also appears in the NYDEC's files for BPSI.

113. Upon information and belief the inclusion of the sonar requirement can also be traced to NYDEC's invited input from the IOGCC, an organization controlled by TPC and on whose governing board sits Gregory Sons, Director of the Minerals Division of NYDEC.

EPA UIC Permit

114. As part of the permitting process necessary to accomplish the objectives of the Lease Agreement between CNGT and BPSI, in May 1996 BPSI applied for underground injection control ("UIC") permits with the EPA. As with the previous applications for permits, MHP and CREST filed objections and protests to the granting of appropriate permits to BPSI by EPA.

115. On May 1, 1997 MHP, through its attorneys, filed comments and a request for a public hearing in BPSI's EPA proceeding. In its comments, MHP objected to the issuance of the draft UIC permits on the basis that:

a. The draft permits disregarded evidence of underground faulting at the Bath site and other geological and engineering problems that could cause

migration of fluids or natural gas from the well bores, cavern or disposal zones into overlying formations and Underground Sources of Drinking Water ("USDWs");

b. BPSI storage caverns do not conform to U.S. Government endorsed design and construction specifications propounded by the IOGCC;

c. Because of the proximity of the proposed wells to existing drinking water wells and USDW's, any evidence of geological problems or safety or design problems with the wells are cause for serious concern;

d. Neither FERC nor NYDEC is satisfied with BPSI's geological stability or well design data;

e. Because disposal of significant quantities of waste brine in underground formations in the Western New York portion of the Appalachian Basin at the pressure limitations imposed in the Class IID draft permits has been demonstrated to be infeasible, there is no basis for issuing final permits;

f. The monitoring requirements in the draft Class IID permit are inadequate;

g. BPSI's Class III draft permit is predicated upon apparent misinformation regarding the intended purpose of the wells; and

h. EPA's proposal to regulate BPSI's brine disposal in Class IID wells is unlawful because it treats BPSI differently than similarly situated parties.

116. On May 27, 1997, MHP filed additional comments with the EPA regarding BPSI's draft UIC permits. In this document, in addition to objecting to EPA approval on the basis of lack of information, MHP referred the EPA to attached reports prepared by Acres and Beck at MHP's request which were critical of the suitability of the BPSI site for natural gas storage. The presentation of these reports to

EPA as well as the allegations made in MHP's earlier submission were an attempt by MHP to derail the BPSI application on the basis of false information which was known to be false by MEP and TPC as well as Acres and Beck at the time it was prepared and submitted. These submissions were intended to enhance MHP's position in the market, vis a vis BPSI and CNGT and otherwise destroy competition.

117. MHP's comments, in large part, were a repetition of its previous filings with FERC and those filed under its direction by CREST at NYDEC. Thus, they were based upon false, unscientific, unverified assumptions that were plainly incorrect. The allegations were known to be false when made by MHP.

118. In particular:

a. There is no evidence of faulting or widespread evidence of cavern ceiling collapses at the Bath Storage Facility;

b. The stated IOGCC guidelines relating to domal salt cavern construction have no applicability to stratified salt formations;

c. MHP's claim that the geology of the region precludes BPSI from demonstrating an ability to dispose of brine into deep injection wells at the proposed disposal rates, is erroneous and not based upon any scientific data applicable to the Bath Storage Facility site; and

d. MHP'S attempt to distinguish between "low pressure" storage of LPG and "high pressure" storage of natural gas is scientifically erroneous.. Both LPG and natural gas are and will be stored in the salt caverns at the same pressure.

119. On May 2, 1997, NYDEC also filed comments with EPA in opposition to the BPSI UIC proposal. These comments also sought to have EPA impose requirements suggested by MHP and its affiliates in an effort thwart the ability of BPSI to obtain the UIC permits.

120. Additionally, on April 28, 1997, CREST, again through Knauf, filed a lengthy opposition to BPSI's application for the UIC permits with the EPA. The opposition contained scurrilous, false and defamatory accusations which were known to be false when made and were only advanced to thwart BPSI's attempts to obtain approval of its project and further enhance MHP's competitive position. The opposition essentially restated the misrepresentations made by CREST to NYDEC as set out in paragraph 93 *supra*.

121. CREST, through its operatives Acres and Knauf has intentionally presented false accusations regarding geological anomalies at the BPSI storage site; presented false evidence regarding brine discharges into the Cohocton River; presented baseless conclusions as to the effect of BPSI's discharges on plant and aquatic life; and has presented other fraudulent and misleading statements to NYDEC and EPA regarding related environmental issues all in an effort to discredit BPSI's project and to assist MHP in its anti-competitive activities.

122. In order to accomplish their unlawful purposes, on numerous occasions, on dates, times and places known only to Defendants, MHP, TPC and CREST have used the U.S. mail and interstate telephone lines to disseminate false information about BPSI and CNGT which has resulted in further protracting the permitting process all to the detriment and loss of both CNGT and BPSI. The U.S. mail and interstate telephone lines have been used in furtherance of Defendant's fraudulent scheme. Defendants are located in Texas, Virginia, and New York, and their engineers are in Colorado and New York.

Defendants Have Conspired to Violate 18 U.S.C. § 1962(c)

123. Defendants MHP, TPC, and CREST each knew about and agreed to facilitate, and adopted the goal of thwarting or delaying and rendering the salt cavern storage project not economical for BPSI, as well as for other potential competitors. Each Defendant actually agreed to make fraudulent and misleading statements or to facilitate that scheme. The mail and interstate wire communications were used in furtherance of that scheme.

124. Each Defendant agreed to commit several acts of mail and wire fraud. From the actions taken by CREST described herein, an agreement to commit those acts can be fairly implied.

125. From the actions taken by MHP described herein, an agreement to commit those acts can be fairly implied. Moreover, in the case of MHP, paying the legal and other expenses of CREST strongly implies an agreement that MHP will pay and CREST will file whatever MHP decides is necessary.

126. From the actions taken by TPC described herein, an agreement to commit those acts can be fairly implied.

127. Each Defendant carried out specific, assigned tasks. Each performed these tasks—albeit illegal tasks—well. This strongly indicates a conscious agreement among Defendants, that each Defendant knew what the roles of the other Defendants would be, and that, thus, the conspiracy extended beyond his immediate role.

128. MHP and CREST's participation in the regulatory process was a sham not designed to promote effective environmental regulation. Rather, this participation, based upon the dissemination of false and misleading information, was and is designed to gain an unfair competitive advantage. Defendants had and continue to have as a goal to increase the

expenses associated with the regulatory application process and to delay any regulatory decisions necessary for the operation of potentially competing salt cavern storage projects in general and BPSI in particular.

Seneca Lake Storage Project

129. On February 7, 1997, MHP even sought leave to intervene and to protest the New York State Electric & Gas Corporation ("NYSEG") application for the Seneca Lake Storage project, phase III, which was pending before FERC (Docket No. CP97-192-000).

130. MRP claimed that NYSEG's construction of its Phase III facilities required FERC certification. NYSEG was not seeking authority to engage in interstate business for its Phase III facilities. Rather, NYSEG sought approval for use of salt cavern storage facilities only for distribution and sale within New York State. MHP falsely asserted that the Phase III facilities were operationally separate from the existing intrastate facilities. FERC disagreed.

131. The Phase III facilities are a "Hinshaw" pipeline exempt from FERC Natural Gas Act jurisdiction pursuant to section 1(c) of the Natural Gas Act, 15 U.S.C. § 717(c).

Pattern Will continue

132. All of these activities set out herein are part of a pattern through which each Defendant has conducted the affairs of the Enterprise in violation of 18 U.S.C. §1962(c). Each Defendant has also violated 18 U.S.C. § 1962(d).

133. BPSI expects discovery to reveal additional predicate acts that formed part of the illegal and fraudulent schemes involving the Defendants.

134. It is readily apparent, therefore, that one or more of the Defendants have sought to intervene and destroy every proposed salt storage cavern facility project in the

Northeastern United States since 1995. It is expected that this pattern of anticompetitive activity would continue in the future.

COUNT I

(As to all Defendants)

RICO, 18 U.S.C. §1962(c)

135. Plaintiff hereby realleges and incorporates paragraphs 1 through 134, as though fully set forth herein.

136. MhP, TPC, CCCV and CREST are associated in fact, as an Enterprise. Each Defendant has conducted the affairs of that Enterprise through a pattern of racketeering: a pattern of mail and wire fraud committed to further fraudulent schemes by disseminating to state and federal regulatory agencies false and misleading statements concerning potential competitors and causing the projects owned by those entities to be delayed to the point of no longer being economically viable. Defendants have engaged in a course of conduct for a common purpose, depriving BPSI of the benefits of its contractual arrangement with CNGT and placing BPSI at a competitive disadvantage vis a vis MHP's Tioga facility.

137. Additionally, this Enterprise has participated in actions which directly resulted in the collapse of the Avoca project, which, had it begun operations, would have been a competitor to the Tioga Project.

138. Defendants were and are engaged in of a pattern of activity by which they sought to destroy every potential underground salt storage project in the Northeastern United States that could compete with the Tioga Project.

139. Inasmuch as BPSI still owns a LPG storage facility, which is ideally suited for the storage of natural gas, there remains the constant threat of continued activity by Defendants to destroy Plaintiff's existing business. Indeed, even though CNGT has announced that it has terminated the

Lease Agreement with BPSI, Defendants continue to engage in their fraudulent disinformation campaign against BPSI.

140. Defendants will each prosper as a result of their illegal activities and the demise of the Lease Agreement and BPSI conversion activities as well as the abandonment of those projects of other potential competitors. TPC and MHP benefit from increasing their competitive position in the salt cavern natural gas storage business, particularly in the key market area of the Northeastern United States. CREST will continue to be funded by MHP.

141. MHP, CCCV, CREST and TPC are an ongoing Enterprise associated in fact and functioning as a continuing unit that exists independently of the racketeering activity to which Defendants have devoted themselves in the interest of destroying BPSI's ability to construct and operate a natural gas storage facility within the meaning of 18 U.S.C. §1961(4). This Enterprise is engaged in interstate commerce and its activities affect interstate commerce.

142. Defendants participated in the conduct of that Enterprise's affairs through a "pattern of racketeering activity," as that term is defined in 18 U.S.C. §1961(1) and §1961(5). The racketeering activity in which Defendants engaged as alleged in great detail herein includes:

a. Acts of mail fraud in violation of the federal mail fraud statute, 18 U.S.C. §1341, by which the Defendants carried out the above-referenced schemes or artifices. Each use of the mail constitutes a separate and indictable offense under 18 U.S.C. §1341, in that Defendants intended to, and did, employ the mails in furtherance of their unlawful schemes, and further constitutes an instance of "racketeering activity" as defined by 18 U.S.C. 1961(1).

b. Acts of wire fraud in violation of the federal wire fraud statute, 18 U.S.C. § 1343, have been carried out by

the Defendants as described in the above-referenced schemes or artifices. Each use of interstate wire communications constitutes a separate and indictable of fense under 18 U.S.C. §1343, in that Defendants intended to and did employ such wire communication in furtherance of their unlawful schemes and further constitutes an instance of "racketeering activity" as defined by 18 U.S.C. § 1961(1).

143. The Defendants' repeated violations of 18 U.S.C. § 1341 and §1343 extended over a period of years and involved distinct, illegal acts. They were neither isolated nor sporadic events, but involved the regular and repeated violation of law to accomplish the Defendants' goals.

144. Each Defendant also exercises direction in the conduct of the affairs of the Enterprise as set out herein.

145. The acts alleged pose a threat of continued criminal activity. These acts have the same or similar purposes, results, participants, victims, or methods of commission. In light of the purpose for these acts, by their very nature, they project into the future with a threat of repetition.

146. As a result of the conduct of the affairs of the Enterprise in the manner set out herein by Defendants, through a pattern of racketeering, BPSI has suffered economic loss totaling $50,000,000.00 (fifty million dollars) resulting from loss of business and loss of contractual opportunity. Specifically, the actions by Defendants that have caused this economic loss violate 18 U.S.C. § 1962(c).

147. Accordingly, BPSI seeks to recover as damages three time the amount of the aforesaid loss or $150,000,000.00 (one hundred fifty million dollars), plus reasonable attorneys fees, and such other relief as this Court deems just and proper.

COUNT II

(As to All Defendants)

RICO CONSPIRACY, 18 U.S.C. § 1962(d)

148. Plaintiff hereby realleges and incorporates paragraphs 1 through 147 as though fully set forth herein.

149. Between December, 1995 and January, 1997, MHP, TPC, CREST, CCCV and NYDEC reached a common understanding or agreement to commit the acts referred to herein.

150. MHP, TPC, CCCV, and CREST each intentionally joined this agreement and in furtherance of this agreement committed the overt acts set out herein.

151. As a result of the foregoing conspiracy, BPSI has suffered economic loss totaling $50,000,000.00 (fifty million dollars) resulting from loss of business and loss of contractual opportunity.

152. In violation of 18 U.S.C. § 1962(d), Defendants conspired to violate 18 U.S.C. § 1962(c) as alleged above.

153. Accordingly, BPSI seeks to recover as damages three time the amount of the aforesaid loss or $150,000,000.00 (one hundred fifty million dollars), plus reasonable attorneys fees, and such other relief as this Court deems just and proper.

COUNT III

(as to MHP and TPC)

§ 2 SHERMAN ACT

154. Plaintiff hereby realleges and incorporates paragraphs I throughl34 as though fully set forth herein.

155. Through the aforesaid acts and practices, including, but not limited to, the formation of sham citizens' environmental groups which opposed all legitimate activities

of the Plaintiff to obtain permits, MHP and TPC have attempted to monopolize the underground storage of high deliverability natural gas in the Northeastern United States in violation of 15 U.S.C. § 2.

156. Given that through MHP, TPC is the largest owner of natural gas salt storage deliverability in the United States, MHP and TPC have a dangerous probability of success in their attempt to monopolize because of the cost and difficulty of obtaining the requisite environmental permits and the high barriers to entry into this business.

157. The activities undertaken by MHP and TPC to thwart attempts to obtain the requisite permits were not undertaken in good faith, are contrary to the antitrust exemptions found in the Noerr-Pennington doctrine and are nothing more than an attempt to interfere with the business of a competitor.

158. By reason of MHP's and TPC's violation of 15 U.S.C. § 2, Plaintiff has been injured in its business or property in the sum of at least $50,000,000.00 (fifty million dollars) and shall continue to suffer such damages as long as such violations continue.

159. Accordingly, BPSI seeks to recover three times its damages, plus reasonable attorneys fees, pursuant to 15 U.S.C. §15, and such other relief as this Court deems just and proper.

COUNT IV

(As to MHP and TPC)

§ 340, NEW YORK'S GENERAL BUSINESS LAW

160. Plaintiff hereby realleges and incorporates paragraphs 1 through 134 as though fully set forth herein.

161. Through the aforesaid acts and practices, including but not limited to, the formation of sham citizens and environmental groups which opposed all legitimate activities

of the plaintiff to obtain permits, MHP and TPC have attempted to monopolize the underground storage of high deliverability natural gas in New York and elsewhere or otherwise restrain the free exercise of competition in that regard all in violation of Article 22, Section 340 of New York's General Business Law.

162. Given that through MHP, TPC is the largest owner of natural gas salt storage deliverability in the United States, MHP and TPC have a dangerous probability of success in their attempt to monopolize because of the cost of and the difficulty of obtaining the requisite environmental permits and the high barriers to entry into this business.

163. The activities undertaken by MHP and TPC to thwart attempts to obtain the requisite permits were not undertaken in good faith and are nothing more than an attempt to interfere with the business of a competitor.

164. Notice of the commencement of this case has been served on the Attorney General of New York pursuant to §340(5) of New York's General Business Law.

165. By reason of Defendants violations of Article 22, Section 340, plaintiff has been injured in its business or property in the sum of at least $50,000,000.000 (fifty hundred million dollars) and shall continue to suffer such damages as long as such violations continue.

166. Accordingly, BPSI seeks to recover three times its damages plus costs and reasonable attorneys fees all as provided in Article 22, Section 340 New York's General Business Law.

COUNT V

(As to all Defendants)

§349, NEW YORK'S GENERAL BUSINESS LAW

167. Plaintiff hereby realleges and incorporates paragraphs 1 through 134 as though fully set forth herein.

168. On August 15 and December 26, 1996, MHP sent to FERC documents previously described herein.

169. The statements and representations contained in these documents were deceptive and misleading in a material way in that they would tend to cause the reader to believe that the storage facilities owned by BPSI should not be used for the storage of natural gas.

170. A reasonable consumer would have been mislead by the misrepresentations of MHP as set out herein.

171. On February 6, 1997, MHP, through CREST, filed numerous false documents with NYDEC as previously described herein. Similarly, on April 28, 1997, MHP, through CREST, sent to EPA documents which made material misstatements regarding BPSI's proposed facility as described herein.

172. The statements and representations contained in these documents as described herein were deceptive and misleading in a material way in that they would tend to cause the reader to believe that the storage facilities owned by BPSI should not be used for the storage of LPG or natural gas.

173. A reasonable consumer would also have been misled by the misrepresentations of CREST as previous set out herein.

174. On May 1, 1997, and May 27, 1997, MHP sent to the EPA comments and requests for a public hearing in BPSI's EPA proceeding as described herein.

175. The statements and representations contained in the documents submitted to the EPA were deceptive and misleading in a material way in that they would tend to cause the reader to believe that the storage facilities owned by BPSI should not be used for the storage of natural gas.

176. A reasonable consumer would have been misled by the representations of MHP.

177. On April 9, 1997 MHP, through CCCV, filed critical comments in the Avoca Natural Gas Storage docket proceeding before FERC objecting to the pipeline proposal.

178. The statements and representations contained that document as described herein were deceptive and misleading in a material way in that they would tend to cause the reader to believe that the storage facilities owned by BPSI should not be used for storage of LPG or natural gas.

179. A reasonable consumer would also have been mislead by the misrepresentations of CCCV.

180. The deceptive and misleading practices described herein adversely affect the public interest in New York. Natural gas customers have been deprived of a reliable storage facility for natural gas. Additionally, it will be more difficult and costly for customers in New York to receive natural gas during periods of peak demand. Moreover, there will be a loss of jobs and income associated with the construction and operation of BPSI's proposed facilities. As a result of this deception, FERC, NYDEC and EPA were caused to undertake unnecessary investigations of the BPSI proposal. The Defendants interfered with FERC's, NYDEC's and EPA's decision making process by complaining of a nonexisting "potential danger."

181. The deceptive and misleading practices described herein violate Article 22-A, Section 349, of New York's General Business Law.

182. As a result of these deceptive and misleading practices, BPSI has suffered damages in the amount of $50,000,000.00 (fifty million dollars).

183. Accordingly, BPSI seeks to recover as damages $50,000,000.00 (fifty million dollars), plus reasonable attorneys fees, and such other relief as this Court deems just and proper.

COUNT VI

(As to all Defendants)

TORTIOUS INTERFERENCE WITH CONTRACT

184. Plaintiff hereby realleges and incorporates paragraphs 1 through 134 as though fully set forth herein.

185. Defendants had knowledge of the valid Lease Agreement between CNGT and BPSI related to the Bath storage facility.

186. Utilizing the methods recited herein, Defendants intentionally interfered with the performance of that agreement and as a result of Defendants' actions, CNGT terminated the Lease Agreement in breach thereof.

187. As a direct consequence of defendant's actions, BPSI has been damaged in the amount of $50,000,000.00 (fifty million dollars).

188. Accordingly, BPSI seeks to recover damages in the amount of $50,000,000.00 (fifty million dollars) plus reasonable attorney fees, and such other relief as this Court deems just and proper.

COUNT VII

(As to all Defendants)

COMMON LAW FRAUD

189. Plaintiff hereby realleges and incorporates paragraphs 1 through 134 as though fully set forth herein.

190. Through the aforesaid acts and practices, Defendants made representations of materially existing facts to NYDEC, FERC and EPA which were false and known to be false when made.

191. NYDEC, FERC and the EPA relied upon those representations and as a result, took actions which damaged BPSI.

192. As a direct and proximate result of the fraudulent conduct of Defendants as set forth herein, BPSI has been damaged in an amount not less than $50,000,000.00 (fifty million dollars).

193. Moreover, in taking the actions set out herein, Defendants acted maliciously, willfully, and with wanton and reckless disregard for the rights of BPSI. Accordingly, Plaintiff is entitled to an award of punitive damages as a result of Defendants' conduct.

194. Accordingly, BPSI seeks to recover as compensatory damages $50,000,000.00 (fifty million dollars) plus punitive damages in the amount of $100,000,000.00 (one hundred million dollars), plus reasonable attorney fees and such other relief as this Court deems just and proper.

WHEREFORE, the Plaintiff demands judgment against the Defendants jointly and severally, as follows:

195. Count I: Judgment against all Defendants for three times the amount of the aforesaid loss or $150,000,000.00 (one hundred fifty million dollars) plus reasonable attorneys fees, and such other relief as this Court deems just and proper.

196. Count II: Judgment against all Defendants for three times the amount of the aforesaid loss or $150,000,000.00 (one hundred fifty million dollars) plus reasonable attorneys fees, and such other relief as this Court deems just and proper.

197. Count III: Judgment against all TPC and MHP for three times the amount of the aforesaid loss or $150,000,000.00 (one hundred fifty million dollars) plus reasonable attorneys fees, and such other relief as this Court deems just and proper.

198. Count IV: Judgment against TPC and MHP for three times the amount of the aforesaid loss or $150,000,000.00 (one hundred fifty million dollars) plus reasonable attorneys fees, and such other relief as this Court deems just and proper.

199. Count V: Judgment against all Defendants for the amount of the aforesaid loss of $50,000,000.00 (fifty million dollars) plus reasonable attorney fees, and such other relief as this Court deems just and proper.

200. Count VI: Judgment against all Defendants for the amount of the aforesaid loss of $50,000,000.00 (fifty million dollars) plus reasonable attorney fees, and such other relief as this Court deems just and proper.

201. Count VII: Judgment against all Defendants for $50,000,000.00 (fifty million dollars) in compensatory damages, punitive damages in the amount of $100,000,000.00 (one hundred million dollars), and reasonable attorney fees and such other relief as this Court deems just and proper.

203. Counts I-VIII: BPSI seeks a permanent injunction enjoining Defendants from continuing their fraudulent schemes directed against BPSI and such further relief as this Honorable Court deems just and proper.

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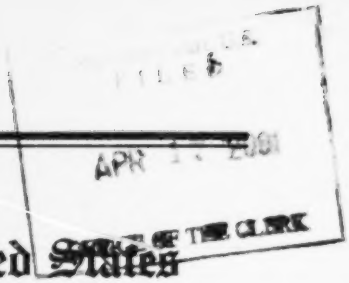

IN THE

Supreme Court of the United States

BATH PETROLEUM STORAGE, INC.,

Petitioner,

v.

MARKET HUB PARTNERS, L.P., MARKET HUB PARTNERS, INC., MARKET HUB HOLDING COMPANY, AND COALITION FOR RESOURCES AND ENVIRONMENT IN THE SOUTHERN TIER, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS MARKET HUB PARTNERS, L.P. AND MARKET HUB PARTNERS, INC.

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CORPORATE DISCLOSURE STATEMENT

Market Hub Partners, L.P. ("MHP LP") and Market Hub Partners Inc. ("MHP Inc.") are both indirectly wholly owned by Duke Energy Corp., a publicly traded company. All of the liabilities associated with MHP LP and MHP Inc. in this litigation remain 100% with NiSource Inc. ("NiSource"), a publicly traded company that previously indirectly wholly owned MHP LP and MHP Inc.

TABLE OF CONTENTS

	Page
Corporate Disclosure Statement	i
Table of Contents	ii
Table of Cited Authorities	iii
Introduction and Summary of Reasons for Denying the Writ	1
Reasons for Denying the Writ	2
I. The Second Circuit's Unpublished Summary Affirmance Of The District Court's Unpublished Decision Does Not Merit Review.	2
II. The Circuits Are In Agreement That *Noerr-Pennington* Immunity Applies To All Petitioning Activity.	8
III. No Court Has Adopted Petitioner's Proposed "Misstatement" Exception To *Noerr-Pennington* Immunity And The Proposal Does Not Merit Review.	14
Conclusion	17

TABLE OF CITED AUTHORITIES

Page

Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc., 707 N.Y.S.2d 647 (App. Div. 2000) 12

Bill Johnson's Restaurant, Inc. v. NLRB, 461 U.S. 731 (1983) 11

California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972) 10, 11, 14

Cardtoons, L.C. v. Major League Baseball Players Association, 208 F.3d 885 (10th Cir.), *cert. denied*, 121 S. Ct. 175 (2000) 3, 9

Cheminor Drugs, Ltd. v. Ethyl Corp., 168 F.3d 119 (3d Cir.), *cert. denied*, 528 U.S. 871 (1999) 3, 7, 9, 14, 15

Coastal States Marketing, Inc. v. Hunt, 694 F.2d 1358 (5th Cir. 1983) 10

Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961) 10

Eaton v. Newport Board of Education, 975 F.2d 292 (6th Cir. 1992), *cert. denied*, 508 U.S. 957 (1993) 9

First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978) 10

Cited Authorities

Page

International Brotherhood of Teamsters v. Philip Morris, Inc., 196 F.3d 818 (7th Cir. 1999) 9

Kottle v. Northwest Kidney Centers, 146 F.3d 1056 (9th Cir. 1998), *cert. denied*, 525 U.S. 1140 (1999) 3, 7, 9, 15

McDonald v. Smith, 472 U.S. 479 (1985) 11

Miracle Mile Associates v. City of Rochester, 617 F.2d 18 (2d Cir. 1980) 9

NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) 11

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 16

Nobelpharma AB v. Implant Innovations, Inc., 141 F.3d 1059 (Fed. Cir.), *cert. denied*, 525 U.S. 876 (1998) 15

Primetime 24 Joint Venture v. National Broadcasting Co., Inc., 219 F.3d 92 (2d Cir. 2000) 11

Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc., 508 U.S. 49 (1993) 7, 11, 12, 14, 15

Cited Authorities

	Page
Rudoff v. Huntington Symphony Orchestra, Inc., 397 N.Y.S.2d 863 (N.Y. Sup. Ct. 1977)	12
South Dakota v. Kansas City S. Industries, 880 F.2d 40 (8th Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990)	9
State v. Mobil Oil Corp., 344 N.E.2d 357 (N.Y. 1976)	12
Sunwest Associates v. Davis, 99 F.3d 1147 (9th Cir. 1996)	9
Tarpley v. Keistler, 188 F.3d 788 (7th Cir. 1999)	9
United Mine Workers v. Illinois State Bar Association, 389 U.S. 217 (1967)	16
Video International Production, Inc. v. Warner-Amex Cable Communications, Inc., 858 F.2d 1075 (5th Cir. 1988), *cert. denied*, 490 U.S. 1047 (1989)	9, 10
Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172 (1965)	15
Whelan v. Abell, 48 F.3d 1247 (D.C. Cir. 1995)	10, 15
United States Constitution:	
First Amendment	*passim*

Cited Authorities

Page

Rules:

2d Cir. R. 0.23 3

Sup. Ct. R. 10 2

INTRODUCTION AND SUMMARY OF REASONS FOR DENYING THE WRIT

Respondents Market Hub Partners, L.P., and Market Hub Partners, Inc. (collectively "MHP") respectfully urge the Court to deny the petition for a writ of certiorari. The decision below does not merit review. The Second Circuit's unpublished order summarily affirmed an unpublished district court decision that turned on a detailed and case-specific analysis of technical, scientific, and geologic evidence contained in the administrative record of multiple federal and state agency proceedings. After thoroughly reviewing the record, the district court rejected Petitioner's claims on the merits, based on lack of proximate cause, as well as on the basis of *Noerr-Pennington* immunity. The issues Petitioner attempts to raise are not squarely presented by the record in this case.

Moreover, contrary to the arguments in the petition, there is no "broad conflict" in the circuits regarding the applicability of *Noerr-Pennington* immunity beyond the Sherman Act. The circuits have recognized that the *Noerr-Pennington* doctrine rests on an explicit First Amendment basis and have routinely dismissed claims such as this one challenging core petitioning activity. Nor has any court adopted Petitioner's view that the "sham" exception to *Noerr-Pennington* immunity requires only the bare allegation of a single misrepresentation in an administrative proceeding without any showing that the misrepresentation had a significant effect on the decision-making process.

Petitioner's proposed restriction of *Noerr-Pennington* to the Sherman Act, and narrowing of the immunity standard, would have serious federalism implications. It would open

up state judicial and administrative proceedings to indirect federal collateral attack under federal statutory causes of action. If adopted, every agency proceeding could spawn a follow-on Sherman Act or RICO treble damages action based on characterizations of an opponent's arguments as "intentionally false." For this reason, and to avoid the chilling effect on protected First Amendment petitioning activity, the circuits have applied *Noerr-Pennington* immunity uniformly in the same way that it was applied here. The courts below followed a consistent line of authority giving full effect to this Court's *Noerr-Pennington* decisions in rejecting this garden-variety antitrust and RICO collateral attack on participation in state and federal regulatory proceedings.

Accordingly, the petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT

I. The Second Circuit's Unpublished Summary Affirmance Of The District Court's Unpublished Decision Does Not Merit Review.

Even if there were any support for Petitioner's alleged "broad conflict" in the circuits regarding the applicability and scope of the *Noerr-Pennington* doctrine, there are no "compelling reasons" for this Court to grant review in this case. *See* Sup. Ct. R. 10.

First, the Petition seeks review of an unpublished summary affirmance of an unpublished district court decision. The Second Circuit's summary order does not constitute a formal opinion of the court and cannot be cited or otherwise used in unrelated cases before the Second

Circuit or any other court. *See* 2d Cir. R. 0.23. Accordingly, even if the Second Circuit's decision somehow conflicted with the decisions of other courts, which it does not, review would not be justified here. Cases involving the applicability of *Noerr-Pennington* to claims similar to those alleged here are commonplace in the federal and state courts, and this Court has not granted review of any of the decisions that have considered the issues in far more depth than the unpublished decision of the Second Circuit. *See, e.g.*, *Cardtoons, L.C. v. Major League Baseball Players Ass'n*, 208 F.3d 885 (10th Cir.), *cert. denied*, 121 S. Ct. 175 (2000); *Cheminor Drugs, Ltd. v. Ethyl Corp.*, 168 F.3d 119 (3d Cir.), *cert. denied*, 528 U.S. 871 (1999); *Kottle v. Northwest Kidney Ctrs.*, 146 F.3d 1056 (9th Cir. 1998), *cert. denied*, 525 U.S. 1140 (1999). To the extent any conflict develops, this Court's review would benefit from a decision that squarely addresses the issues and develops them to the extent necessary to facilitate more meaningful consideration on certiorari.

Second, review is not warranted because the Second Circuit's summary affirmance turned on a "detailed factual record [] set out by the district court." Pet., App. 2a, 20a-42a. Based on an exhaustive review of the administrative record in a thorough opinion, the district court determined that Petitioner could not establish how any of the Respondents' alleged misstatements had any effect on the administrative proceedings. *See id.* The decision was consistent with the way *Noerr-Pennington* immunity has been applied in other courts.

Petitioner's effort to expand its underground natural gas storage facility required regulatory approval and triggered federal and state agency proceedings. In the agency

proceedings, Respondents submitted expert declarations regarding interpretation of complex geologic data associated with the underground facility and provided information relating to regulatory, economic, environmental and safety issues associated with the project. Petitioner asserted below that these submissions were false, that these false statements somehow led to delays in permitting, and that these delays caused a third party (CNG Transmission Corp. ("CNGT")) to breach an agreement with Petitioner to lease the facility. Pet., App. 2a. The district court properly and carefully analyzed the public record of each of the agency proceedings in dismissing Petitioner's claims.

FERC Proceedings. Petitioner asserted below that the Respondents fraudulently delayed FERC proceedings relating to approval of Petitioner's natural gas storage permit. However, as the district court determined, MHP did not initiate those proceedings and MHP's participation in the proceedings was well-grounded in established agency procedures. *See id.* at 33a. MHP made three filings in that proceeding. The first filing (on August 15, 1996) argued that under settled law FERC should require Petitioner to cease and desist from development activities at Petitioner's proposed gas storage facility prior to obtaining FERC approval. *Id.* at 34a. FERC agreed with that legal argument and Petitioner did not contend below that MHP's legal position was incorrect. *Id.* MHP's second filing (on August 28, 1996) dealt solely with regulatory rates that CNGT had proposed to charge its customers. *Id.* Numerous parties made filings opposing CNGT's proposals based on the same economic arguments raised by MHP. *Id.* Petitioner did not challenge any statements made in the August 28 filing. *Id.* MHP's third filing (on December 26, 1996), like its second filing, primarily addressed regulatory rates CNGT proposed to charge its customers, and Petitioner did not contest those statements either. *Id.*

Petitioner's lawsuit focused narrowly on a few of MHP's statements in the third FERC filing regarding geological, scientific and environmental issues raised by the proposed project. *Id.* at 34a-35a. But as the district court concluded, "the fact is that the New York [Department of Environmental Conservation ("NYDEC")] brought these issues to FERC's attention before MHP filed any papers with FERC." *Id.* at 33a. Many of the potential problems at the site were based on uncontested evidence of the history of Petitioner's operations, and other statements were subject to good-faith disagreement and were carefully considered in the administrative forum. *Id.* at 35a. The district court concluded that Respondents had "probable cause" for their comments in the FERC proceeding. *Id.* Relatedly, the district court concluded that Petitioner failed to demonstrate how the Respondents caused any agency "delay" or caused CNGT to breach its lease agreement with Petitioner. *See id.* at 40a. As the district court pointed out, numerous parties other than Respondents participated in the proceedings, and CNGT's breach of its lease followed its apparent miscalculation that Petitioner could begin work on the storage project prior to obtaining FERC approval, which FERC properly did not allow. *Id.* at 41a-42a.

NYDEC Proceedings. Petitioner's proposal to expand its natural gas storage caverns required a modification of Petitioner's State Pollution Discharge Elimination System permit by NYDEC. Petitioner alleged that Respondents somehow prompted the modification proceeding to delay the project. But as the district court determined from the administrative record, the permit modification proceeding was initiated by NYDEC, not by the Respondents. *Id.* at 36a. Petitioner also alleged that Respondents formed a "sham" environmental group — Coalition for Resources and

Environment in the Southern Tier, Inc. ("CREST") — to participate in the proceedings. But as the district court noted, the administrative record showed that Petitioner challenged the involvement of CREST at the administrative level and the NYDEC Administrative Law Judge expressly considered CREST's alleged affiliation with MHP. *See id.* Petitioner also alleged false statements made by CREST in the proceeding concerning environmental and safety risks associated with the project. But again, as the district court determined, the ALJ accepted many of those positions as consistent with the law and the evidence. The ALJ deemed many of the statements Petitioner highlights in this lawsuit — concerning an alleged geological fault at the site and other environmental concerns — to be beyond the scope of the NYDEC proceeding. *Id.* at 36a-37a. Accordingly, they were immaterial. In any event, as the district court determined, the NYDEC proceedings had nothing to do with Petitioner's alleged harm — CNGT's breach of its lease — because "CNGT breached its agreement long before the DEC and EPA proceedings were ever completed." *Id.* at 40a.

EPA Proceedings. Petitioner also alleged in its complaint that Respondents delayed EPA proceedings concerning Petitioner's natural gas storage project. Again, however, the district court determined from the public record that the EPA proceedings were not initiated by any actions by MHP or the other Respondents. The proceedings were necessary for EPA approval of Petitioner's application for underground injection control permits. *See id.* at 37a. EPA held a public hearing and received public comments from many parties, including NYDEC. The other parties raised many of the same issues raised by the Respondents. *See id.* Nor did EPA suggest that any of the comments it received were frivolous or baseless, including the alleged

misstatements relating to the presence of a geological fault at the site. *Id.* at 38a. Accordingly, Petitioner could not establish how any of the statements, even if false, influenced the proceeding in any way. Nor could Petitioner establish how the Respondents independently caused any agency "delay," given the numerous similar comments received from other parties to the proceeding. Finally, as the district court noted, the immediate cause of Petitioner's alleged loss — CNGT's breach of contract — occurred long before the conclusion of the EPA proceedings. *See id.* at 40a.

In dismissing Petitioner's claims relating to the FERC, NYDEC, and EPA proceedings, the district court engaged in a straight-forward and fact-specific application of *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (1993) ("*PRE*"). All of the issues Petitioner raised in its federal lawsuit — including CREST's alleged affiliation with MHP and alleged misstatements relating to technical data and environmental concerns – were considered by the agency decisionmakers. Petitioner's argument that it should nonetheless be permitted to maintain a federal lawsuit challenging non-frivolous, substantial arguments that, in any event, did not affect the proceedings, is fundamentally inconsistent with *PRE*. Such a rule would sanction just the sort of open-ended inquiry into parties' motives, and agency decisionmakers' rationales, that every circuit applying *PRE* has sought to avoid in cases similar to this one. *See, e.g., Cheminor*, 168 F.3d 119; *Kottle*, 146 F.3d 1056. The Second Circuit's unpublished decision is perfectly consistent with the treatment of core petitioning immunity by other courts and therefore does not merit review.

Third, review is not warranted because even if Petitioner's attempt to restrict *Noerr-Pennington* immunity

and to alter the immunity standard applied by the lower courts could succeed, Petitioner's claim would still fail in any event for failure to establish proximate cause. The district court determined that Petitioner's claims were barred not only under the *Noerr-Pennington* doctrine but also failed on the merits. There is no way for Petitioner to establish, based on the underlying public record, that any statements the Respondents made independently "delayed" the proceedings or that the Respondents caused CNGT to breach its lease with Petitioner. *See* Pet., App. 38a-42a. Accordingly, even if Petitioner's *Noerr-Pennington* arguments merited consideration by this Court (which they do not), review should await a case where resolution of the issues could have an effect on the lower court proceedings. Here, it is clear that Petitioner's claim cannot succeed under any theory or cause of action, irrespective of the *Noerr-Pennington* doctrine.

Accordingly, the petition for a writ of certiorari should be denied.

II. The Circuits Are In Agreement That *Noerr-Pennington* Immunity Applies To All Petitioning Activity.

Petitioner argues that review should be granted to resolve a "broad conflict" in the circuits regarding the applicability of *Noerr-Pennington* to petitioning activity outside the context of the Sherman Act. *See* Pet. at 10-11. Petitioner also argues that the Court should determine that the *Noerr-Pennington* doctrine does not immunize the core petitioning activity at issue here. *Id.* at 15-21. Contrary to the Petition, however, there is no conflict in the circuits. No reason exists to restrict the First Amendment principles upon which *Noerr-Pennington* immunity is based.

First, there is no conflict in the circuits. The circuits have uniformly recognized the First Amendment basis of *Noerr-Pennington* immunity. *See, e.g., Int'l Bhd. of Teamsters v. Philip Morris, Inc.*, 196 F.3d 818, 826 (7th Cir. 1999); *Kottle*, 146 F.3d at 1059; *Miracle Mile Assocs. v. City of Rochester*, 617 F.2d 18, 20 (2d Cir. 1980). For this reason, the courts have applied the doctrine to non-Sherman Act federal and state causes of action arising out of petitioning activity. *See, e.g., Cheminor*, 168 F.3d 119; *Kottle*, 146 F.3d 1056; *Tarpley v. Keistler*, 188 F.3d 788 (7th Cir. 1999); *Sunwest Assocs. v. Davis*, 99 F.3d 1147 (9th Cir. 1996); *Eaton v. Newport Bd. of Educ.*, 975 F.2d 292 (6th Cir. 1992), *cert. denied*, 508 U.S. 957 (1993); *South Dakota v. Kansas City S. Indus.*, 880 F.2d 40 (8th Cir. 1989), *cert. denied*, 493 U.S. 1023 (1990); *Video Int'l Prod., Inc. v. Warner-Amex Cable Communications, Inc.*, 858 F.2d 1075 (5th Cir. 1988), *cert. denied*, 490 U.S. 1047 (1989).

In spite of an overwhelming and consistent line of authority broadly applying the *Noerr-Pennington* doctrine to all petitioning activity, Petitioner claims that there is a conflict in the circuits based principally on a single, sharply-divided Tenth Circuit decision, *Cardtoons*, 208 F.3d 885. But *Cardtoons* did not involve petitioning activity. Rather, *Cardtoons* involved state law claims that arose out of *pre*-litigation threats communicated between private parties. *See id.* at 887. The Tenth Circuit never questioned the fundamental principle that *Noerr-Pennington* immunity would apply to core petitioning activity. Here, there is no issue concerning such pre-petitioning activity; rather, Petitioner seeks to subject the Respondents to treble damages for their direct participation in public administrative proceedings. This activity is at the heart of the First Amendment. *Cardtoons* is inapposite.

Nor do the two other decisions invoked by Petitioner support its claimed conflict in the circuits. *See* Pet. at 11. The Fifth Circuit's decision in *Coastal States Marketing, Inc. v. Hunt*, 694 F.2d 1358, 1364-65 (5th Cir. 1983) suggested that *Noerr* "was not a first amendment decision," but expressly acknowledged the important First Amendment underpinnings of *Noerr*. *See id.* But more important, *Coastal States Marketing* did not address the applicability of *Noerr-Pennington* to non-Sherman Act causes of action. *See id.* In any event, the Fifth Circuit has subsequently acknowledged the First Amendment basis of *Noerr-Pennington* immunity and has applied the doctrine to immunize petitioning activity outside the Sherman Act context. *See Video Int'l Prod.*, 858 F.2d 1075. The third decision invoked by the Petitioner, *Whelan v. Abell*, 48 F.3d 1247 (D.C. Cir. 1995), declined to address the applicability of *Noerr-Pennington* to state law claims but suggested that in certain circumstances application of state law causes of action to petitioning activity could violate the First Amendment. *See id.* at 1254. The "broad conflict" in the circuits suggested by Petitioner (at 10) does not exist.

Second, contrary to Petitioner's suggestion that *Noerr-Pennington* immunity should not apply outside the Sherman Act context, this Court has repeatedly acknowledged the First Amendment basis of the doctrine. Although the doctrine arose out the Sherman Act, it stands for the proposition that "the First Amendment protects the right of corporations to petition legislative and administrative bodies." *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 792 n.31 (1978) (citing *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)). The Court made clear in *California Motor Transport* that

the First Amendment right to petition underlays the *Noerr-Pennington* doctrine. *See* 404 U.S. at 510-11. The Court has subsequently cited *California Motor Transport* as a First Amendment decision. *See, e.g., McDonald v. Smith*, 472 U.S. 479, 484 (1985). And in *PRE*, the Court noted that *Noerr*'s First Amendment principles have been applied beyond the antitrust context. *See* 508 U.S. at 59 (citing *Bill Johnson's Rest., Inc. v. NLRB*, 461 U.S. 731, 743-33 (1983) and *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)).

Accordingly, even if the *Noerr-Pennington* doctrine is technically a "construction of the Sherman Act" (Pet. at 15-16), this Court's decisions make clear that such a construction was based entirely on principles arising from the First Amendment itself. The Court's *Noerr-Pennington* decisions have determined that the Sherman Act could not have been meant to impinge upon important First Amendment rights. *See, e.g., California Motor Transp.*, 404 U.S. at 510-11; *Primetime 24 Joint Venture v. Nat'l Broad. Co., Inc.*, 219 F.3d 92, 99 (2d Cir. 2000) (Winter, C.J.) ("Having noted in *Noerr* the 'important constitutional questions' implicated by the right to petition the legislature . . . , the Supreme Court later made explicit its reliance on First Amendment principles — albeit as an interpretation of the Sherman Act itself — in extending *Noerr* to apply to concerted actions before courts and administrative agencies."). The First Amendment's protection of petitioning activity does not cease to apply under the federal racketeering statute or under state law.

Contrary to Petitioner's argument, there is nothing peculiar to the antitrust laws that justifies broader First Amendment immunity than the racketeering laws. The antitrust laws, like RICO, reach intentional and criminal conduct. As the Court squarely held in *PRE*, immunity

applies irrespective of evidence of an anticompetitive purpose or intent. *See* 508 U.S. at 60. Accordingly, the fact that RICO reaches intentional criminal conduct does not justify Petitioner's suggested wholesale rejection of *Noerr-Pennington* immunity in the RICO context. While a RICO lawsuit may establish criminal conduct that is beyond the protections of the *Noerr-Pennington* doctrine — for example, where the challenged petitioning activity is objectively unreasonable, based on material misrepresentations, or involves bribery — the underlying record here establishes that this is not such a case. Accordingly, review is not warranted to address this issue.

Petitioner's argument that immunity does not apply to the state law claims also does not merit review. The state law claims alleged violations of the New York antitrust statute, violations of New York consumer protection law, tortious interference with contract, and common law fraud. *See* Pet., App. 89a-95a. Clearly, irrespective of Petitioner's arguments, the doctrine applies to Petitioner's state antitrust claim, because the state antitrust laws are modeled on and governed by the same standards as the federal antitrust laws. *See, e.g., State v. Mobil Oil Corp.*, 344 N.E.2d 357, 359 (N.Y. 1976). The doctrine also applies to the other state law claims. Indeed, New York courts have applied the doctrine to the same New York state law claims that are at issue here. *See, e.g., Alfred Weissman Real Estate, Inc. v. Big V Supermarkets, Inc.*, 707 N.Y.S.2d 647 (App. Div. 2000). New York courts have also, as a matter of state public policy, held that tortious interference claims should not be extended "to those situations wherein a citizen petitions an agency of his government." *Rudoff v. Huntington Symphony Orchestra, Inc.*, 397 N.Y.S.2d 863, 865 (N.Y. Sup. Ct. 1977). The principles underlying *Noerr-Pennington* are fully applicable

to the core petitioning activity at issue here, irrespective of how that conduct is labeled or how Petitioner's challenge is framed.

Petitioner suggests that applying *Noerr-Pennington* immunity to state law causes of action raises federalism concerns. *See* Pet. at 20-21. However, Petitioner's attempt to restrict the *Noerr-Pennington* doctrine to the Sherman Act and to broaden the fraud exception to *Noerr-Pennington* immunity to encompass immaterial misrepresentations would have serious federalism implications. Absent meaningful immunity for core petitioning activity, disappointed participants in state agency and judicial proceedings would be able to invoke the federal courts as an open avenue of indirect collateral attack on state proceedings under the RICO statute or state law. Especially if immunity could be avoided based on the mere allegation of an immaterial misrepresentation (*see* Pet. at 21-24), state agency factual determinations would be subject to frequent relitigation in the federal courts. At the same time, there is no conflict between the *Noerr-Pennington* immunity standard applied by the courts below and the valid interests served by the underlying state law claims at issue here. It would be every bit as chilling of First Amendment rights to allow Petitioner to maintain its state law claims absent any objectively unreasonable conduct or material misrepresentations on the part of the Respondents as it would be to allow Petitioner to maintain its federal antitrust claims. And valid state law claims will often avoid *Noerr-Pennington* immunity because the underlying conduct necessary to satisfy the elements of the cause of action — fraud, for example, which requires materiality and reliance — will be sufficient to establish that immunity does not apply.

Because Petitioner's claimed broad conflict in the circuits does not exist, and there is no independent reason for this Court to consider whether immunity should apply in this case, the petition should be denied.

III. No Court Has Adopted Petitioner's Proposed "Misstatement" Exception To *Noerr-Pennington* Immunity And The Proposal Does Not Merit Review.

Petitioner also seeks review based on the argument that the Second Circuit's unpublished decision conflicts with other decisions regarding the scope of the "fraud exception" to *Noerr-Pennington* immunity. *See* Pet. at 12-15. Petitioner urges the Court to grant review in order to create an immunity exception that would apply to any allegation of a misrepresentation made in an adjudicatory proceeding, whether the misrepresentation was material or not. *See* Pet. at 21-24. However, there is no conflict in the circuits and Petitioner's proposed standard is untenable. Accordingly, review is not justified.

This Court in *PRE* left open the question "whether and, if so, to what extent *Noerr* permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations." 508 U.S. at 62 n.6. Based on the suggestion in *California Motor Transport* that "[m]isrepresentations . . . are not immunized when used in the adjudicatory process," 404 U.S. at 513, some circuits have recognized a "fraud exception" to the *Noerr-Pennington* doctrine. However, contrary to Petitioner's argument, these circuits have required that the misrepresentation affect the legitimacy of the proceeding before the exception to *Noerr-Pennington* immunity applies. Applying the same analysis as the courts below in this case, the Third Circuit observed in *Cheminor* that "our approach

in requiring that misrepresentations must be *material* to bar *Noerr-Pennington* immunity is consistent with the two other circuit courts of appeals that have considered this issue." 168 F.3d at 124 n.12 (citing *Kottle*, 146 F.3d 1056 (recognizing exception for "intentional misrepresentations" that "deprive the litigation of its legitimacy") and *Whelan*, 48 F.3d 1247 (disallowing *Noerr-Pennington* immunity based on material misrepresentations to securities regulators)).

As Petitioner acknowledges, the Ninth Circuit's fraud exception "stems from an extension of the *Walker Process* doctrine." Pet. at 14. This Court in *PRE* cited *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172 (1965), in reserving the question of whether a fraud exception should apply to *Noerr-Pennington* immunity. *See* 508 U.S. at 62 n.6. But contrary to Petitioner's argument, the *Walker Process* doctrine requires proof of a *material* misrepresentation before fraud in the *ex parte* patent application process can deprive the patent-holder of a patent defense to antitrust claims. *See Walker Process*, 382 U.S. at 176 (antitrust counterclaims may be maintained where there is evidence that the patent-holder "obtained the patent by knowingly and willfully misrepresenting the facts" as opposed to "technical fraud"). The Federal Circuit has applied the *Walker Process* doctrine to require "independent and clear evidence of deceptive intent together with a clear showing of reliance, *i.e.*, that the patent would not have issued but for the misrepresentation or omission." *Nobelpharma AB v. Implant Innovations, Inc.*, 141 F.3d 1059, 1071 (Fed. Cir.), *cert. denied*, 525 U.S. 876 (1998). The Third Circuit in *Cheminor* noted that the materiality element of the *Noerr-Pennington* fraud exception is consistent with *Nobelpharma* and *Walker Process*. *See Cheminor*, 168 F.3d at 124 n.12.

Petitioner's immaterial misrepresentation exception to *Noerr-Pennington* immunity is inconsistent with First Amendment values. As this Court has repeatedly made clear, the right to petition "[is] among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967). The occasionally "erroneous statement is inevitable." *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964). Where, as here, review of the administrative record shows that the alleged misstatements had no effect on the proceedings and all objections to the statements were fully considered by the administrative decisionmakers in the first instance, it would only serve to chill First Amendment protected activity to allow collateral challenges to go forward. As previously explained, such a broad immunity exception would also sanction indirect federal court challenges of state proceedings based on nothing more than allegations that statements made in connection with a public administrative process were erroneous.

The district court carefully examined the allegations of misrepresentations in light of the entire public record, which showed that the agency decisionmakers themselves expressly considered the very allegations of falsehoods and sham participation by CREST that Petitioner attempts to relitigate in federal court. Petitioner could not demonstrate how any of the alleged misstatements affected the proceedings in any way. *See* Pet., App. at 3a, 29a-42a. Contrary to Petitioner's argument, the lower courts' common sense analysis is consistent with the approach adopted by other circuits and is fully faithful to the First Amendment.

Accordingly, the petition for a writ of certiorari should be denied.

CONCLUSION

The petition for writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

BATH PETROLEUM STORAGE, INC.,

Petitioner,

v.

MARKET HUB PARTNERS, L.P., MARKET HUB PARTNERS, INC., MARKET HUB HOLDING COMPANY, AND COALITION FOR RESOURCES AND ENVIRONMENT IN THE SOUTHERN TIER, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT MARKET HUB HOLDING COMPANY

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QUESTIONS PRESENTED

Whether the court of appeals correctly affirmed the district court's application of *Noerr-Pennington* immunity to Petitioner's claims, asserted under the RICO statute, arising from petitioning activity during state and federal administrative processes.

Whether immaterial misrepresentations made during state and federal administrative processes are protected by *Noerr-Pennington* immunity.

Whether the district court's dismissal of Petitioner's Complaint can be affirmed based on alternative grounds, including failure to state a valid claim for relief under the RICO statute.

STATEMENT PURSUANT TO RULE 29.6

Pursuant to Sup. Ct. R. 29.6, Respondent Market Hub Holding Company, formerly known as TPC Corporation, declares that it is 100% owned by Duke Energy Gas Transmission Corporation, which is indirectly owned by Duke Energy Corporation, a publicly-held corporation.

During the time period covered by the allegations in Petitioner's Complaint, the ultimate parent of the then TPC Corporation was PacifiCorp. PacifiCorp has certain retained liabilities relating to this litigation. PacifiCorp, formerly a publicly-held corporation, is indirectly wholly owned by Scottish Power, a publicly-held corporation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	iv
Introduction and Summary of Reasons for Denying Petition	1
Reasons for Denying the Writ	2
Alternative Grounds for Affirmance Appear from the Record.	2
A. The Complaint Fails to State a Claim under RICO.	2
B. BPSI's Alleged Harm Resulted from "Governmental Action," thereby Immunizing Respondents from Liability	5
Conclusion	7

TABLE OF CITED AUTHORITIES

Page

Cases:

City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365 (1991) 5, 6

Eastern R.R. Presidents Conference v. Noerr Motor Freight, 365 U.S. 127 (1961) ..... i, 1, 2, 4, 5, 6

Fernandez-Montes v. Allied Pilots Ass'n., 987 F.2d 278 (5th Cir. 1993) 3

Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n, 107 F.3d 1026, (3d Cir.), *cert. denied*, 522 U.S. 907 (1997) 6

Menasco, Inc. v. Wasserman, 886 F.2d 681 (4th Cir. 1989) 4

Mine Workers v. Pennington, 381 U.S. 657 (1965) ..... i, 1, 2, 4, 5, 6

Moss v. Morgan Stanley, Inc., 719 F.2d 5 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984) 2, 3

Schenck v. Pro-Choice Network, 519 U.S. 357 (1997) 2

Sessions Tank Liners, Inc. v. Joor Mfg., Inc., 17 F.3d 295 (9th Cir.), *cert. denied*, 513 U.S. 813 (1994) 5, 6

Cited Authorities

	Page
Smith v. Phillips, 455 U.S. 209 (1982)	2
West Hartford v. Operation Rescue, 915 F.2d 92 (2d Cir. 1990)	2, 3
Western Assocs. LTD. Partnership v. Market Square Assoc., 235 F.3d 629 (D.C. Cir. 2001)	3
Statutes:	
18 U.S.C. §§ 1961-1968	2
18 U.S.C. § 1961(1)	4
18 U.S.C. § 1962(c)	3
18 U.S.C. § 1964(c)	3
Rule:	
United States Supreme Court Rule 10	1
Other Authority:	
2A Moore's *Federal Practice*, & 12.-07[2.-5] (2d ed. 1991)	3

INTRODUCTION AND SUMMARY OF REASONS FOR DENYING PETITION

Respondent Market Hub Holding Company, formerly known as TPC Corporation ("TPC") respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioner, Bath Petroleum Storage, Inc. ("BPSI"). TPC adopts the Brief in Opposition to Petition for Writ of Certiorari for Respondents Market Hub Partners, L.P. and Market Hub Partners, Inc. (collectively "MHP"). TPC writes separately to emphasize that *Noerr-Pennington* issues advanced by BPSI in its Petition are not squarely presented in this case.

BPSI's Petition raises two issues: (1) whether *Noerr-Pennington* immunity applies to petitioning activity that purportedly gives rise to claims under the RICO statute; and (2) whether *Noerr-Pennington* immunity extends to allegedly false but immaterial misstatements made in administrative proceedings. TPC agrees with MHP that certiorari on these issues is not warranted.

While the lower courts did not need to rule on additional issues, Respondents also sought dismissal of the complaint on the following grounds: (1) BPSI's Complaint fails to state a claim upon which relief can be granted under the RICO statute; and (2) BPSI's alleged damage resulted directly from governmental action, which provides Respondents with immunity. As a result, even if certiorari were granted, the Court could affirm either (1) without addressing *Noerr-Pennington* in the first instance; or (2) by relying on the lack of causation and the "governmental action" rule. Therefore, Petitioner's issues are not squarely presented. No "compelling reasons" warrant certiorari on this record. S. Ct. R. 10.

REASONS FOR DENYING THE WRIT

ALTERNATIVE GROUNDS FOR AFFIRMANCE APPEAR FROM THE RECORD.

The Court may affirm on any ground supported by the record. *See, e.g., Schenck v. Pro-Choice Network*, 519 U.S. 357, 384 (1997); *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982) ("Respondent may, of course, defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted").

As shown by MHP, Petitioner mistakenly claims that a "broad conflict" exists among the circuits as to whether *Noerr-Pennington* immunity applies outside of the specific context of the Sherman Act. TPC respectfully submits that because alternative grounds support affirmance here, granting certiorari in this case cannot reasonably guarantee that Petitioner's *Noerr-Pennington* issues will be addressed.

A. The Complaint Fails to State a Claim under RICO.

While the district and circuit courts properly based their opinions on *Noerr-Pennington* immunity and the lack of causation, the record also establishes that the complaint fails to state a claim upon which relief can be granted under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO").

To sustain its RICO claims, BPSI has two pleading burdens. *West Hartford v. Operation Rescue*, 915 F.2d 92, 100 (2d Cir. 1990); *Moss v. Morgan Stanley, Inc.*, 719 F.2d 5, 17 (2d Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

First, BPSI must allege that each named defendant has violated the substantive RICO statute; in this case 18 U.S.C. § 1962(c). *Operation Rescue*, 915 F.2d at 100. Specifically, BPSI must allege that (1) defendant TPC (2) through the commission of two or more predicate acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly conducted or participated in (6) an enterprise (7) the activities of which affected interstate or foreign commerce. *Operation Rescue*, 915 F.2d at 100; *Moss*, 719 F.2d at 17 (*citing* 18 U.S.C. § 1962).

Second, BPSI must show that it has standing, *i.e.*, that it was "injured in [its] business or property *by reason of* a violation of section 1962" by TPC. *Moss*, 719 F.2d at 17 (*citing* 18 U.S.C. § 1964(c)).

BPSI may satisfy its double burden only by alleging sufficient facts which permit a reasonable inference that all of the RICO elements have been met. Yet, "conclusory allegations or legal conclusions masquerading as factual allegations" will not do. *Fernandez-Montes v. Allied Pilots Ass'n.*, 987 F.2d 278, 284 (5th Cir. 1993) (*citing* 2A Moore's *Federal Practice*, & 12.-07[2.-5] at 12-64 n.6 (2d ed. 1991)).

"RICO claims premised on mail or wire fraud must be particularly scrutinized because of the relative ease with which a plaintiff may mold a RICO pattern from allegations that, upon closer scrutiny, do not support it." *Western Assocs. LTD. Partnership v. Market Square Assoc.*, 235 F.3d 629, 637 (D.C. Cir. 2001) (internal quotation marks omitted).

BPSI thus may not base a RICO claim on conduct it simply deems wrongful or "inappropriate." *Complaint*, & 106 (Pet., App. 76a). BPSI must instead plead a specific pattern

of conduct amounting to "racketeering activity," defined as specific state law felonies as well as certain federal crimes. 18 U.S.C. § 1961(1).

BPSI has not met — and cannot meet — its pleading burdens. BPSI's complaint: (1) is grounded in conduct that is not "racketeering activity" as defined under the statute; (2) fails to describe the necessary "pattern" of racketeering activity required by RICO; (3) does not demonstrate the existence of a viable RICO "enterprise"; and (4) fails to allege that BPSI has suffered harm as the result of a racketeering activity, and thus fails to allege standing. *See* Pet., App. 45a-96a.

BPSI in the main alleges garden-variety tortious conduct, which is insufficient under RICO. To fit under the RICO umbrella, BPSI attempts to rely on mail and wire fraud. *See Complaint*, & 6 (Pet., App. 47a). Yet BPSI fails to plead adequately the commission of either of those crimes, much less to satisfy the pattern requirement. "If the pattern requirement has any force whatsoever, it is to prevent . . . ordinary commercial fraud from being transformed into a federal RICO claim. . . . If we were to recognize a RICO claim based on the narrow fraud alleged here, the pattern requirement would be rendered meaningless." *Menasco, Inc. v. Wasserman*, 886 F.2d 681, 685 (4th Cir. 1989).

Because the complaint fails to state a valid claim for relief under RICO in the first instance, it would not be necessary for this Court to reach the issue of whether *Noerr-Pennington* applies to Petitioner's RICO claims. The Petition should be denied.

B. BPSI's Alleged Harm Resulted from "Governmental Action," thereby Immunizing Respondents from Liability.

Petitioner argues that review is necessary on the question of whether immaterial misstatements constitute an independent exception to *Noerr-Pennington* immunity, apart from the traditional "sham" exception. The record demonstrates that the Court could affirm without directly addressing the immaterial misstatement exception issue raised by Petitioner. The Court has long recognized that because *Noerr-Pennington* immunity focuses on the petitioning process itself, if a defendant attempts to "disrupt" a competitor's "business relationships . . . through the ultimate product of that lobbying and consideration," no liability attaches to the conduct. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 381 (1991). A "sham" arises only where "the delay is sought to be achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks." *Id. See also Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 299 (9th Cir.) (holding that when alleged antitrust injuries "flow[] directly from governmental action," the claim is taken "entirely out of" the sham exception), *cert. denied*, 513 U.S. 813 (1994).

In its complaint, BPSI expressly acknowledged that it was harmed not by MHP's lobbying efforts, but by the government action itself that was the subject matter of the public administrative proceedings related to Petitioner's permit applications. *See Complaint*, ¶¶ 10, 11, 87, 90, 91, 101, 104, 105, 106, 107, 108, 109, 111, 112, 113, 119 (Pet., App. 48a, 69a, 70a, 75a-79a, 82a). Notably, for example, the Federal Energy Regulatory Commission *granted* MHP's request for a cease and desist order. (*Id.* at 33a-34a).

In that instance, it was undisputedly the order itself, not the process used to obtain the order, that allegedly damaged Petitioner. (*Id.* at 41a-42a). The same reasoning holds true for Petitioner's other alleged damages.

The record is clear that any claimed injuries were not caused by the alleged immaterial representations. This is so precisely because the alleged misrepresentations were, by definition, immaterial. Petitioner could not demonstrate how any of the alleged misstatements affected the proceedings in any way. *See* Pet., App. at 3a, 29a-42a. Petitioner's injuries were caused, if at all, directly by governmental action. Thus, "there is state action at issue here, not private conduct." *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 107 F.3d 1026, 1037, n.11 (3d Cir.), *cert. denied*, 522 U.S. 907 (1997). The complaint's allegations, considered in light of the administrative record, are sufficient to conclude that Petitioner's claims are taken "entirely out of" the traditional sham exception under *Noerr-Pennington*. *Sessions Tank Liners, Inc.*, 17 F.3d at 299.

BPSI apparently seeks to avoid the state action limitation on liability by implicating the New York Department of Environmental Conservation in the alleged scheme to destroy BPSI's business. The district court properly rejected this argument because there is no "conspiracy exception" to *Noerr-Pennington* for conduct undertaken between state and private actors. *Omni Outdoor Advertising*, 499 U.S. 365, 383 (1991) ("a 'conspiracy' exception to *Noerr* must be rejected.").

Petitioner's *Noerr-Pennington* issues are not squarely raised. Petitioner's claimed damage resulted, if at all, directly from state action.

CONCLUSION

Based on the foregoing, as well as the reasons set forth in MHP's Brief in Opposition, the Petition should be denied.

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IN THE

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BATH PETROLEUM STORAGE INC.,

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MARKET HUB PARTNERS, L.P., MARKET HUB PARTNERS, INC., TPC CORPORATION, AND COALITION FOR RESOURCES AND ENVIRONMENT IN THE SOUTHERN TIER, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI	1
I. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS ON THE QUESTIONS PRESENTED	2
A. The Second Circuit's Decision Applying The *Noerr-Pennington* Doctrine Outside The Anti-Trust Context Conflicts With Other Courts Of Appeals, And With Decisions Of This Court	2
B. The Second Circuit's Narrow Construction Of The "Fraud Exception" To *Noerr-Pennington* Conflicts With Decisions Of Other Courts Of Appeals, And With Decisions Of This Court	5
II. THIS CASE PRESENTS AN APPROPRIATE VEHICLE TO RESOLVE THE CONFLICTS AMONG THE CIRCUITS AND DETERMINE THE SCOPE OF THE *NOERR-PENNINGTON* DOCTRINE	8
CONCLUSION	10

TABLE OF AUTHORITIES

CASES — Page

Bill Johnson's Rests., Inc. v. *NLRB*, 461 U.S. 731 (1983) 4
California Motor Transp. Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972) 5
Cardtoons, L.C. v. *Major League Baseball Players Ass'n*, 208 F.3d 885 (10th Cir.), *cert. denied*, 121 S. Ct. 175 (2000) 2, 3, 4
Cheminor Drugs, Ltd. v. *Ethyl Corp.*, 168 F.3d 119 (3d Cir.), *cert. denied*, 528 U.S. 871 (1999) 6
City of Columbia v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991) 7
Clipper Exxpress v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240 (9th Cir. 1982) 6
Conley v. *Gibson*, 355 U.S. 41 (1957) 9
Eastern R.R. Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) 3, 5
Garrison v. *Louisiana*, 379 U.S. 64 (1964) 8
Kottle v. *Northwest Kidney Ctrs.*, 146 F.3d 1056 (9th Cir. 1998), *cert. denied*, 525 U.S. 1140 (1999) 6
NAACP v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) 4
New York Times Co. v. *Sullivan*, 376 U.S. 254 (1964) 8
Nobelpharma AB v. *Implant Innovations, Inc.*, 141 F.3d 1059 (Fed. Cir. 1998) 7
Professional Real Estate Investors, Inc. v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993) 4
Walker Process Equip., Inc. v. *Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965) 6

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

The court of appeals' decision in this case presents two questions for this Court's review: (1) whether *Noerr-Pennington* immunity, which has been applied by this Court to date only in antitrust cases, applies to claims brought under the RICO statute; and (2) whether fraud or misrepresentation in the course of an administrative proceeding is immunized if the misrepresentation is not the basis of the administrative body's decision but nonetheless causes collateral harm. Despite the attempts of Market Hub Partners, L.P., and Market Hub Partners, Inc. ("Respondents") and Market Hub Holding Company ("MHHC") to obscure these issues, this case presents an excellent vehicle for this Court to resolve the conflicts that have arisen among the circuits that have considered them.

First, contrary to the Respondents' claim, there are courts of appeals – most prominently the Tenth Circuit – that consider *Noerr-Pennington* to be rooted in a construction of the Sherman Act, and thus have held the immunity applicable only in that context. This view, which is consistent with the pronouncements of this Court and inconsistent with the decision of the Second Circuit below, requires courts to construe the specific statute at issue before concluding that immunity analogous to *Noerr-Pennington* is applicable.

Second, Respondents obscure the question whether *Noerr-Pennington* should immunize fraudulent petitioning activity, by suggesting that Petitioner has urged this Court to recognize immunity for *any* misrepresentation, including unintentional misstatements that cause no anticompetitive harm. To the contrary, Petitioner objects to the materiality requirement as applied narrowly by the court of appeals. Given that *Noerr-Pennington* immunity protects against the collateral effects of litigation beyond the mere outcome, neither the Second

Circuit nor Respondents have explained why, as a constitutional or statutory matter, the sham exception should focus on the misrepresentation solely vis-à-vis the outcome of the litigation.

Finally, Respondents contend that this case is an inappropriate vehicle for this Court to resolve these open issues. Although the Second Circuit's decision is unpublished this does not cure the split among the circuits. It only means that the court's misinterpretation of *Noerr-Pennington* is settled law in that circuit. Moreover, the Second Circuit does not stand alone in its views, as the court squarely followed other courts of appeals in arriving at its decision. And, despite Respondent's assertion that the decision "turned on a 'detailed factual record ... set out by the district court,'" Opp. 3 (quoting App. 2a), this is both irrelevant and misleading. The case was decided on a motion to dismiss and thus provides a clean record on which to decide the pure legal issues posed by the holding below.

I. THERE IS A CONFLICT AMONG THE COURTS OF APPEALS ON THE QUESTIONS PRESENTED.

A. The Second Circuit's Decision Applying The *Noerr-Pennington* Doctrine Outside The Anti-Trust Context Conflicts With Other Courts Of Appeals, And With Decisions Of This Court.

The Second Circuit's conclusion that *Noerr-Pennington* immunity extends beyond the Sherman Act is in conflict with those cases that recognize that *Noerr-Pennington* is rooted in a construction of the Act itself. Pet. 10-11. Most recently, the Tenth Circuit held that although the First Amendment right to petition might confer immunity outside of the antitrust context, it is a misnomer to refer to it as "*Noerr-Pennington*" immunity. See *Cardtoons, L.C.* v. *Major League Baseball Players Ass'n*, 208 F.3d 885, 889 (10th Cir.) ("it is more appropriate to refer to immunity as *Noerr-*

Pennington immunity only when applied to antitrust claims"), *cert. denied*, 121 S. Ct. 175 (2000). The court explained that because the "first rationale for immunity – an interpretation of the Sherman Act – is not present" in other statutory settings, "[t]o the extent that Supreme Court precedent can be read to extend *Noerr-Pennington* outside of the antitrust context, it does so solely on the basis of the right to petition." *Id.*

Although *Cardtoons* stands in direct conflict with the Second Circuit's decision, Respondents attempt to distinguish it on the basis that it "involved state law claims that arose out of *pre*-litigation threats communicated between private parties," and thus did not resolve the question whether *Noerr-Pennington* applies outside the antitrust context to "core petitioning activity." Opp. 9. This is simply a misreading of *Cardtoons*. The court there recognized that the case involved pre-petitioning activities, but found that to be relevant only insofar as the First Amendment right to petition was concerned; its discussion of *Noerr-Pennington*, in contrast, clearly applied to both petitioning, and pre-petitioning, activities.

In an attempt to extend the protections of *Noerr-Pennington* beyond its original antitrust roots, Respondents obscure both the origin of the doctrine, and how this Court has subsequently treated it in other contexts. Respondents overstate the extent to which *Noerr-Pennington* is rooted in the First Amendment, arguing that "even if the *Noerr-Pennington* doctrine is technically a 'construction of the Sherman Act' (Pet. at 15-16), this Court's decisions make clear that such a construction was based *entirely* on principles arising from the First Amendment itself." Opp. 11 (emphasis added). However, this argument ignores this Court's primary rationale for *Noerr-Pennington*, unrelated to the First Amendment, that a contrary interpretation "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of that Act." *Eastern R.R.*

Presidents Conference v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

Respondents similarly mischaracterize this Court's subsequent treatment of *Noerr-Pennington* in other contexts, stating that "*Noerr*'s First Amendment principles have been applied beyond the antitrust context." Opp. 11 (citing *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 59 (1993) ("*PREI*")). First, however, the Court made clear in *PREI* that it only extended the *Noerr-Pennington* doctrine "by analogy." 508 U.S. 49, 59 (1993). Second, in both cases that Respondents cite to support this proposition – *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982) and *Bill Johnson's Restaurants, Inc.* v. *NLRB*, 461 U.S. 731 (1983) – the Court only construed an immunity exception after thorough consideration of the statute at issue. See Pet. 16-17. In *Bill Johnson's*, for instance, the Court considered whether it was lawful for a State to enjoin an employer from bringing a retaliatory lawsuit. In concluding that the State could not, unless the suit were based on insubstantial claims, the Court explicitly relied on a construction of the National Labor Relations Act, informed by First Amendment principles, and not a direct application of *Noerr-Pennington*. See 461 U.S. at 741-45. The decision demonstrates the significance of this distinction because the Court actually provided for narrower immunity in the labor context: whereas a non-sham lawsuit is immune from all antitrust liability, the Court held that an employer who brought a non-sham retaliatory lawsuit could still be held liable for an unfair labor practice, although the lawsuit could not be enjoined. See *id.* at 749 ("although it is an unfair labor practice to prosecute an unmeritorious lawsuit for a retaliatory purpose, the offense is not enjoinable unless the suit lacks a reasonable basis"); see also *Cardtoons*, 208 F.3d at 889 n.4 (discussing the distinction between immunity under the NLRA and *Noerr-Pennington* immunity).

Because petitioning activity is not absolutely immunized, see *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 512 (1972) ("unethical conduct in the setting of the adjudicatory process often results in sanctions"), Respondents must at least offer an argument why *Noerr-Pennington* immunity should be extended to RICO violations. Whereas this Court has construed the Sherman Act only to cover *business* activities, *Noerr*, 365 U.S. at 136-37, there is no similar reason to impute to Congress an intent to exempt from RICO liability fraudulent *petitioning* activity, when the statute covers a wide array of criminal behavior. Thus, Respondents' sole response – that "[t]he antitrust laws, like RICO, reach intentional and criminal conduct," Op. 11 – is patently insufficient.

In response to Petitioner's argument that an expansive reading of *Noerr-Pennington* will unduly constrain states in policing misconduct in their courts and administrative agencies, Pet. 20-21, Respondents identify a competing concern – that limiting *Noerr-Pennington* to the Sherman Act, and allowing for an exception for fraud or other misrepresentations would create a flood of "indirect collateral attack[s] ... under the RICO statute or state law" in federal courts. Opp. 13. Respondents' concerns are grossly overstated because a RICO claimant could not file in federal court solely on the basis of an isolated instance of abuse of the state judicial process, but rather only upon proving a pattern of racketeering activity – a relatively high hurdle.

B. The Second Circuit's Narrow Construction Of The "Fraud Exception" To *Noerr-Pennington* Conflicts With Decisions Of Other Courts Of Appeals, And With Decisions Of This Court.

The Second Circuit's holding that only misrepresentations that are "material" to the outcome of the proceeding are excepted from *Noerr-Pennington* stands in conflict with other courts of appeals that recognize a more robust exception for fraud or other misrepresentations. Pet. 12-15. The Ninth

Circuit has spoken most clearly on this issue, holding that there is no "require[ment] that the body on whom the fraudulent misstatements are pressed ultimately believe those statements." *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1262 (9th Cir. 1982).

Respondents suggest that there is no conflict between the Ninth Circuit, on the one hand, and the Second – and Third Circuit which it follows – on the other. Respondents rely on the statement of the Third Circuit itself that "[o]ur approach in requiring that misrepresentations must be *material* to bar *Noerr-Pennington* immunity is consistent with the two other circuit courts of appeals that have considered this issue," one of which was the Ninth Circuit. *Cheminor Drugs, Ltd.* v. *Ethyl Corp.*, 168 F.3d 119, 124 n.12 (3d Cir.) (citing *Kottle* v. *Northwest Kidney Ctrs.*, 146 F.3d 1056 (9th Cir.), *cert. denied*, 525 U.S. 1140 (1999)), *cert. denied*, 528 U.S. 871 (1999). However, given that the Ninth Circuit has not abandoned its rejection of the materiality requirement in *Clipper Exxpress* – which was, in fact, cited in *Kottle*, 146 F.3d at 1060 – the Third Circuit's characterization of its opinion as consistent with the Ninth Circuit approach is unpersuasive. Although the Ninth Circuit stated in *Kottle* that *Noerr-Pennington* will not apply to intentional misrepresentations that "deprive the litigation of its legitimacy," this does not require that the judicial body *rely* on the misrepresentation. *Id.* Surely, as in this case, intentional misrepresentations that go to the substantive heart of the proceeding, and are made with the attempt to inflict collateral harm on a competitor "deprive the litigation of its legitimacy."

Respondents also argue that the Ninth's Circuit's fraud exception relies on a flawed interpretation of the *Walker Process* doctrine. However, nothing in *Walker Process* suggests a materiality requirement – rather, the thrust of the language quoted by Respondent (Opp. 15) centered on the *intent* of the patent holder, not the *materiality* of the misrepresentation. *Walker Process Equip., Inc.* v. *Food*

Mach. & Chem. Corp., 382 U.S. 172, 177 (1965) (distinguishing between "knowing[] and willful[] misrepresentation," which would be subject to antitrust liability, and "good faith" misrepresentation, or "'technical fraud,'" which would not). Moreover, the case that Respondents cite in support of their reading of *Walker Process*, *Nobelpharma AB* v. *Implant Innovations, Inc.*, 141 F.3d 1059 (Fed. Cir. 1998), makes clear that *Walker Process* and *Noerr-Pennington* represent two distinct lines of cases, each "provid[ing] its own basis for depriving a patent owner of immunity from the antitrust laws." *Id.* at 1071. Whereas *Noerr-Pennington* deals with the collateral harms of litigation, *Walker Process* deals with the particular problem of obtaining a patent through fraudulent means; as such, even were materiality relevant in the latter context, it surely would not be in the former.

Respondents further contend that an "immaterial misrepresentation exception to *Noerr-Pennington* immunity is inconsistent with First Amendment values." Opp. 16. First, however, Respondents' characterization of Petitioner as advocating an "immaterial misrepresentation exception" completely misstates its position. Petitioner has alleged that Respondents' misrepresentations were material – in the sense that they inflicted collateral harm – but not in the Second Circuit's narrow sense of being material *to the outcome* of the proceeding. Since the focus of the sham exception is on litigation used to inflict collateral harm, see *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380 (1991) ("The 'sham' exception to *Noerr* encompasses situations in which persons use the governmental *process* – as opposed to the *outcome* of that process – as an anticompetitive weapon"), it makes no sense to consider only the direct outcome of the litigation and not the collateral effect.

Second, in arguing that Petitioner's position is "inconsistent with First Amendment values," Opp. 16, Respondents do not explain why it is relevant from a First Amendment

perspective that a misrepresentation be material to the outcome of litigation, even if it causes collateral anticompetitive injury. Respondents' citation (*id.*) of general First Amendment platitudes is misplaced. Petitioner has not suggested that the fraud exception covers unintentional misrepresentations; rather, Petitioner has alleged that Respondents' misrepresentations were part of a pattern of *intentional* falsehoods, for which the First Amendment does not provide protection, even for political speech. *Garrison* v. *Louisiana*, 379 U.S. 64, 75 (1964) ("That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution.... [T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection"); see also *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-80 (1964).

II. THIS CASE PRESENTS AN APPROPRIATE VEHICLE TO RESOLVE THE CONFLICTS AMONG THE CIRCUITS AND DETERMINE THE SCOPE OF THE *NOERR-PENNINGTON* DOCTRINE.

Because this case squarely presents the two questions on which the Second Circuit and other courts of appeals have split – whether *Noerr-Pennington* applies outside the antitrust context and whether *Noerr-Pennington* immunizes misrepresentations that are not material to the outcome of the proceeding in which they were made – it is an excellent vehicle to resolve these questions.

Respondents maintain that because the Second Circuit's decision is unpublished, it does not constitute a formal opinion of the Circuit on which certiorari can be granted. A rule that would make publication a prerequisite for this Court's review, however, would allow courts of appeals to shelter their rulings from review simply by not publishing them. And, to the contrary, the Second Circuit's decision not to publish its opinion merely indicates that it considered the decision to be the well-settled law of the Circuit, and thus did

not require the formality of publication. Furthermore, the fact that the Second Circuit and district court below adopted the approach of other circuits – both in applying *Noerr-Pennington* outside the antitrust context, App. 2a, 32a, and in adopting a materiality requirement to the fraud exception, *id.* at 31a – without any independent reasoning indicates that the analysis of these courts of appeals has matured, making the circuit split that already exists on these issues ripe for resolution by this Court now.

Respondents also assert that the Second Circuit's decision relied on a "'detailed factual record ... set out by the district court,'" Opp. 3 (quoting App. 2a), and "an exhaustive review of the administrative record." *Id.* What Respondents obscure, however, is that this case was brought on a motion to dismiss under Rule 12(b)(6). For instance, Respondents repeatedly assert that Petitioner has not demonstrated that the alleged misrepresentations affected the proceedings in any way. See, *e.g.*, *id.* at 8 ("There is no way for Petitioner to establish, based on the underlying public record, that any statements the Respondents made independently 'delayed' the proceedings or that the Respondents caused CNGT to breach its lease with Petitioner"); *id.* at 16 ("The district court carefully examined the allegations of misrepresentations in light of the entire public record .... Petitioner could not demonstrate how any of the alleged misstatements affected the proceedings in any way").

At the motion to dismiss stage, a court must assume all factual allegations in the complaint to be true, *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957), and Petitioner has plead facts sufficient to state a claim. Specifically, Petitioner has alleged that Respondents made false submissions to the Federal Energy Regulatory Commission ("FERC") to prevent Petitioner from gaining access to the natural gas storage market by: (1) delaying its permit approval process until Market Hub Partners ("MHP") could obtain approval of its own Tioga project; (2) increasing Petitioner's transactional

costs significantly to lead it to abandon its efforts to become a natural gas storage facility; and (3) causing sufficient delays to lead CNG Transmission Corp. ("CNGT") to terminate the lease agreement. App. 68a (Complaint ¶ 83). Further, Petitioner alleged that "it was clear that MHP and the other Defendants had been successful in delaying consideration by FERC of the use by CNGT of the Bath Storage Facility for the storage of natural gas." *Id.* at 69a (Complaint ¶ 85). And, "[i]n November 1997 CNGT informed [Petitioner] that as a direct result of MHP's and [the Coalition for Resources and Environment in the Southern Tier, Inc.'s] actions to thwart regulatory approval, it had determined to terminate the Lease Agreement with [Petitioner], which was finally accomplished in January 1998." *Id.* (Complaint ¶ 86). Because Petitioner has alleged facts sufficient to meet its pleading burden, and substantial legal questions arise directly from the decision of the courts below to dismiss, this Court's review is appropriate.

Finally, Respondent Market Hub Holding Company argues that "because alternative grounds support affirmance here, granting certiorari in this case cannot reasonably guarantee that Petitioner's *Noerr-Pennington* issues will be addressed." MHHC's Opp. 2. Surely there is no requirement for certiorari that no alternative grounds of affirmance can be asserted. MHHC's Opposition, which presents issues not addressed below and thus which are entirely irrelevant to the question whether this Court should review the Second Circuit's decision, only serves to cast doubt on MHHC's confidence in the holding under review. That doubt is fully justified, but it hardly supports leaving in place the square conflicts among the circuits.

CONCLUSION

For the reasons set forth in the petition and herein, the petition for certiorari should be granted.

Respectfully submitted,

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